STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: MATT SHIRK,

Case No. 19-3434EC

Respondent.
_____/

ADVOCATE'S REQUEST FOR OFFICIAL RECOGNITION OF RELATED CASE

COMES NOW, Advocate for the Commission on Ethics, pursuant to Sections 90.202-90.204, Florida Statutes, and Rules 28-106.204 and 28-106.205, *Florida Administrative Code*, requests that the Court take official recognition of the following in support of Advocate's case-in-chief at the final hearing.

A. BACKGROUND AND PROFFER – Court Records

This is an ethics action against a former public official who was and is licensed by the Florida Bar at all relevant times. Exhibit "A."

The ethical allegation is: Respondent, Matt Shirk, while serving as the Public Defender for the Fourth Judicial Circuit, Florida, disclosed confidential attorney-client information relating to the representation of his minor client, Cristian Fernandez, obtained in Respondent's capacity as the Public Defender via an interview he gave to a documentary crew interested in the client's case. COE Complaint No. 15-002R

In 2011, the Public Defender's Office was appointed to represent Cristian Fernandez, a 12-year-old child, indicted for first degree murder and aggravated child abuse. Respondent, acting in his official capacity as the Public Defender, handled the case for a period of time. Fernandez was the subject of several detailed forensic psychological evaluations, with the results presented orally and by written report to the Court. In addition, due to the significant national, state, and local media attention, the parties were ordered not to discuss the case except with certain necessary persons.

Filed August 15, 2019 4:01 PM Division of Administrative Hearings

In 2013, Respondent gave an interview to a documentary crew in which he disclosed information obtained through private communications with Fernandez. On December 16, 2014, the Duval County Grand Jury issued its report finding that Respondent violated his oath of confidence and secrecy by disclosing privileged information without a waiver. Respondent assets that Fernandez verbally waived any attorney-client privilege. Grand Jury Presentment, December 16, 2014.

The issue in this case is whether Fernandez waived the attorney-client privilege and, if so, did he have the mental capacity to give informed consent to reveal privileged discussions as required by Florida Bar Rule of Professional Conduct 4-1.6.

It merits emphasizing the point that Fernandez's chronological, psychological, and emotional age, and mental faculties at the time of the alleged verbal waiver can be ascertained through the parties' pleadings and subsequent court orders in the criminal case. The relevant documents critical to the issues in this case were filed in *State of Florida v. Cristian Fernandez*, Case 16-2011-CF-006222-AXXX-MA (Duval County, Florida, Feb. 8, 2013), and include the following[1]:

a. State of Florida vs. Cristian Fernandez, Indictment for Murder in the First Degree; Aggravated Child Abuse
b. Order Determining Eligibility for Court-Appointed Counsel
c. Waiver of Speedy Trial
d. Order Concerning Transfer
e. Motion to Disqualify Judge
f. Motion for Reasonable Pretrial Detention
g. Motion to Clarify Pretrial Publicity Order and Memorandum of Law in Support
h. Temporary Protective Order
i. Amended Protective Order
j. Motion for Substitution of Counsel Upon the Direction of the Guardian Ad Litem
k. Consent Order Appointing Guardian Ad Litem
l. Amended Motion to Appoint Guardian Ad Litem

[1] These documents are attached as composite Exhibit "B."

m. Memorandum of Law in Support of Motion to Dismiss Unconstitutional Indictment
n. Order of Substitution of Counsel
o. Motion to Prohibit the Public Defender from Making Extra-Judicial Statements About Pending Proceedings
p. Order Granting, In Part, and Denying, In Part, Defendant's Motions to Suppress Statements
q. Order of Continued Confidentiality
r. Plea of Guilty to Lesser Included Offenses
s. Supplemental Memorandum of Law in Support of Motions to Suppress Statements with Report of Dr. William Meadows[2]
t. Report of Dr. David Fassler
u. Report of Dr. Marty Beyer

B. SUPPORTING LEGAL AUTHORITY

Courts have the power to take judicial notice of any matter bearing a relationship to the case. Section 90.202(6), Florida Statutes, provides that a court may take judicial notice of its own records in a pending case as well as the court records in other cases, whether they be cases filed in the State of Florida or in another jurisdiction. *Hunt v. State,* 613 So. 2d 893, 898 n.5 (Fla. 1992) (Supreme Court granted appellant's motion to judicially notice the record in another case.); *Falls v. National Environmental Products,* 665 So. 2d 320 (Fla. 4th DCA 1995) (Proper for trial court and appellate court to take judicial notice of the pleadings and briefs "of other actions filed which bear a relationship to the case at bar."); *Collinsworth v. O'Connell,* 508 So. 2d 744 (Fla. 1st DCA 1987) (In considering petition to modify shared parental responsibility judgment, trial court did not err in judicially noticing contents of psychological evaluation of mother which had been introduced at initial hearing, when final judgment provided that any future hearing could utilize any relevant evidence.).

[2] The reports of the doctors (s, t, and u) are not included in Exhibit "B" due to the confidential nature of their contents.

A court record is not subject to dispute: either it is or it is not a record of a court. When it is shown to the satisfaction of the judge that a document is a record of a court, then the judge should judicially notice it.

In the criminal case, Respondent successfully argued to the court that certain statements Fernandez made should be suppressed due to his lack of ability to understand his Miranda rights. It is anticipated Respondent will attempt to disavow those statements about his former client's mental capacity at the final hearing in order to maintain that Fernandez was competent to waive his attorney-client privilege. Therefore, the above-referenced documents are essential to matters herein and should be officially recognized.

The doctors' reports and other court documents, including orders of the court, will be introduced into evidence by Advocate and offered against Respondent's anticipated testimony at final hearing. The identity of issues in both the criminal case and this matter are identical in that Fernandez's ability to comprehend and knowingly and voluntarily waive any right is at issue. Previously, Respondent had an opportunity and motive to develop or challenge the doctors' opinions and reports at the earlier court proceeding, thus, the reports are sufficiently reliable to be admissible at the final hearing.

As to any hearsay objections to the materials proffered for Official Recognition, specifically the medical reports of three doctors[3] – one prepared at the behest of the State of Florida, and two prepared at the behest of Fernandez's attorneys (including Respondent) – the documents are admissible as records of regularly conducted business activity under Section 90.803(6) and as former testimony under Section 90.804(2).

[3] All three doctors are unavailable to testify at the final hearing. Dr. Meadows, although located in the Jacksonville area, is unavailable to testify on Friday, August 23, 2019, Dr. Marty Beyer is in Eugene, Oregon, and Dr. David Fassler is in is in Vermont.

Furthermore, any court-filed documents drafted, signed, and/or filed by Respondent in his representative capacity as Fernandez's attorney is admissible as a party-opponent admission under Section 803.18a. The rationale behind the admissibility of this type of evidence is that the declarant is a party opponent and there is no need to cross-examine himself and therefore the reason for the hearsay exclusion does not exist. Charles W. Ehrhardt, Florida Evidence, Vol. 1, §803.18 (2019 ed.)

As to other documents, they either will not be offered to prove the truth of the facts asserted in them or a drafter of the document will be present to testify. Therefore, they are admissible.

C. PROFFER – Florida Bar Rules and Comments

Florida Bar Rules of Professional Conduct, Rule 4-1.6, "Confidentiality of Information," et al.

D. SUPPORTING LEGAL AUTHORITY

The Court may take judicial notice of "[f]acts that are not subject to dispute because they are generally known within the territorial jurisdiction of the court" and "[f]acts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned." §90.202(11), (12), Fla. Stat. Article V, Section 15 of the Florida Constitution gives the Florida Supreme Court exclusive and ultimate authority to regulate the admission of persons to the Florida Bar. Therefore, the Florida Bar is an official arm of the Florida Supreme Court and it is charged with administering a statewide disciplinary system to enforce Supreme Court rules of professional conduct for its members. Many of an attorney's professional responsibilities are prescribed in the Rules of Professional Conduct. Every attorney, including Respondent, is responsible for observance of these rules.

The Rules of Professional Conduct are easily available through the Florida Bar's official website and, thus, the Rules are properly subject to judicial notice.[4] Exhibit "C."

Rule 4-1.6, "Confidentiality of Information," is relevant in this case because it refers to an attorney's duty to a client regarding consensual revelation of information relating to representation of a client. It is alleged that Respondent violated Section 112.313(8), Florida Statutes, by revealing information relating to the representation of a client, obtained in his capacity as Public Defender, via an interview he gave to a documentary crew interested in the client's case.

E. CONCLUSION

Cristian Fernandez was the subject of several detailed psychological evaluations conducted by various doctors shortly after he was indicted for criminal offenses. The court documents show that Respondent argued that Fernandez lacked the mental competency to understand and voluntarily waive his Miranda Rights. Yet, around the same time, Respondent asserts that young Fernandez had the capability to comprehend the ramifications of waiver of the attorney-client privilege and verbally waived that right.

Respondent objects to this request for official recognition.

WHEREFORE, for the above-stated reasons, the Advocate respectfully requests this Honorable Court take official recognition of the documents listed herein as authorized by law and as the just course of action and grant such further relief that the Court deems just and fair.

[4] https://www.floridabar.org/wp-content/uploads/2018/10/2019_04-Oct-12-2018-RRTFB.pdf

RESPECTFULLY SUBMITTED on the 17th day of August, 2019.

Elizabeth A. Miller

ELIZABETH A. MILLER
Advocate for the Florida Commission on Ethics
Florida Bar No. 578411
Office of the Attorney General, The Capitol, PL-01
Tallahassee, Florida 32399-1050
Telephone: (850) 414-3300, Ext. 3702
Fax: (850) 488-4872
elizabeth.miller@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this document, along with exhibits, was sent via e-mail only to Respondent, Matt Shirk, Esquire, 25 North Market Street, Jacksonville, Florida 32202; e-mail: mshirklaw@aol.com, on this 17th day of August, 2019.

Elizabeth A. Miller

Elizabeth A. Miller

MEMBER PROFILE

Matt Shirk

Member in Good Standing

Eligible to Practice Law in Florida

EXHIBIT
tabbies
A
#19-3434EC

Bar Number:

195911

Mail Address:

Shirk Law, PA
25 N Market St
Jacksonville, FL 32202-2802
United States

Office: **904-705-1831**

Cell: **904-705-1831**

Fax: 904-289-2661

Email:

mshirklaw@aol.com

Personal Bar URL:

https://www.floridabar.org/mybarprofile/195911

vCard:

County:

Duval

Circuit:

04

Admitted:

04/12/2000

10-Year Discipline History:

None

Law School:

Florida Coastal School of Law, 1999

Federal Courts:

U.S. Court of Appeals for the Eighth Circuit

U.S. District Court, Middle District of Florida

State Courts:

Florida

Firm:

Shirk Law, PA

Firm Position:

Private Law Practice

The Find a Lawyer directory is provided as a public service. The Florida Bar maintains limited basic information about lawyers licensed to practice in the state (e.g., name, address, year of birth, gender, law schools attended, admission year). However, The Florida Bar allows individual attorneys the opportunity to add personal and professional information to the directory. The lawyer is solely responsible for reviewing and updating any additional information in the directory. The lawyer's added information is not reviewed by The Bar for accuracy and The Bar makes no warranty of any kind, express or implied. The Florida Bar, its Board of Governors, employees, and agents are not responsible for the accuracy of that additional information. Publication of lawyers' contact information in this listing does not mean the lawyers have agreed to receive unsolicited communications in any form. Unauthorized use of this data may result in civil or criminal penalties. The Find a Lawyer directory is not a lawyer referral service.

S. A. CASE NO.: 11CF041986AD

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY, SPRING TERM,2011

THE STATE OF FLORIDA

vs.

CRISTIAN FERNANDEZ

INDICTMENT FOR

MURDER IN THE FIRST DEGREE; AGGRAVATED CHILD ABUSE

A TRUE BILL

Louis J. Gilbert Jr.

Foreperson of the Grand Jury

WITNESS FOR THE STATE

DET. M.J. SOEHLIG

Presented in open Court by the Grand Jury and filed

this 2ND day of June, 2011.

JIM FULLER

Clerk Circuit Court

By: M Ruth

Deputy Clerk

ANGELA B. COREY
STATE ATTORNEY

EXHIBIT
Composite B (a)
#19-3434 EC

S.A. CASE NO.:

11
CF
041
986
AD

CL
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K'S
NO.
:

CCR NO.: 2011-0205809 DJJ ID NO.: 1166101

OFFENSE(S) CHARGED: MURDER

DEFENDANT IDENTIFICATION DATA

EXTRADITION CODE:
NAME and ALIAS: CRISTIAN JUAN FERNANDEZ
HOME ADDRESS: 11815 Alden Road Apt 102, Jacksonville, Florida 32246
HOME PHONE: (904) 762-7312
PREVIOUS ADDRESS:
WORK ADDRESS:
WORK PHONE:
RACE / SEX: White / Male
DOB / AGE: 01/14/1999 / 12

SSN:
D/L NO. / STATE: / FL
HEIGHT / WEIGHT: 5'1" / 140
HAIR: Black
EYES: Brown
SCARS, MARKS, TATTOOS:
GLASSES:
BEARD:
HAS RESISTED ARREST?
CONSIDERED DANGEROUS?
KNOWN TO BE ARMED?

ANY ADDITIONAL **DOB'S** AND/OR **UNIQUE** IDENTIFIERS?

_____
_____
_____

NOTE: IT IS IMPERATIVE FOR SUCCESSFUL SERVICE OF WARRANT THAT ALL BLANKS ARE FILLED WHEN POSSIBLE OR APPLICABLE.

NOTICE OF CONFIDENTIAL INFORMATION WITHIN COURT FILING

Pursuant to Florida Rule of Judicial Administration 2.420(d)(2), the filer of this court record indica confidential information is included within the document being filed; towit: Social Security Number, § 1

S. A. CASE NO.: 11CF041986

CLERK NO.: 16 2011 CF 6222-AXXX
DIVISION: CR-G

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY,
SPRING TERM, IN THE YEAR TWO THOUSAND ELEVEN

STATE OF FLORIDA

vs.

CRISTIAN FERNANDEZ

INDICTMENT FOR:

MURDER IN THE FIRST DEGREE and
AGGRAVATED CHILD ABUSE

IN THE NAME OF AND BY AUTHORITY OF THE STATE OF FLORIDA

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that CRISTIAN FERNANDEZ, on the 14th day of March, 2011, in the County of Duval and the State of Florida, unlawfully and from a premeditated design to effect the death of [redacted] or during the commission, attempt to commit, or escape from the immediate scene of an Aggravated Child Abuse did then and there kill the said [redacted] a human being, by inflicting blunt force trauma upon said victim, thereby inflicting upon the said [redacted] certain mortal wounds from which he did thereafter continually languish and languishing, did live until March 16, 2011, on which date he died from said mortal wounds, contrary to the provisions of Section(s) 782.04(1)(a), Florida Statutes.

SECOND COUNT

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that CRISTIAN FERNANDEZ, on the 14th day of March, 2011, in the County of Duval and the State of Florida, did abuse [redacted] a person under the age of 18 years, by committing an Aggravated Battery upon [redacted], contrary to the provisions of Section 827.03(2), Florida Statutes.

Foreperson of the Duval County Grand Jury

ANGELA B. COREY, STATE ATTORNEY
FOURTH JUDICIAL CIRCUIT

Bernardo de la Rionda
Bar Number 365841
Assistant State Attorney
Fourth Judicial Circuit in and for Duval County,
Florida, Prosecuting for said State

EXHIBIT
tabbies

I, Bernardo de la Rionda, Assistant State Attorney for the Fourth Judicial Circuit of Florida, in and for Duval County, hereby certify that I, as such Prosecuting Officer and as authorized and required by law, have advised the Grand Jury which returned this Indictment this 2nd day of June, 2011.

Bernardo de la Rionda
Bar Number 365841
Assistant State Attorney

NOTICE OF CONFIDENTIAL INFORMATION WITHIN COURT FILING

Pursuant to Florida Rule of Judicial Administration 2.420(d)(2), the filer of this court record (Information) indicates that confidential information is included within the document being filed; to wit: Social Security Number, § 119.0714.

Race: Hispanic Sex: Male DOB: 1/14/99 **SSN:**

BR/dd

Custody: X_____ Yes _____ No Bond $_____ None X_____

Capias: X_____ (If not in custody) Arraignment Date: June 8, 2011

Juvenile: X_____ Yes _____ No Sealed _____ Yes X_____ No

Receiving Judge: _____

MCL NO: S782.04(1)(A), CAP; S827.03(2)

FILED
JUN 04 2011
CLERK CIRCUIT COURT

IN THE CIRCUIT OR COUNTY COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

DIVISION: Pby CU-It

CASE NO.: 11-18606

VS.

Cristian Fernandez

ORDER DETERMINING ELIGIBILITY FOR COURT-APPOINTED COUNSEL

The above-named defendant appearing before the Court, and said defendant having executed an affidavit of insolvency and financial statement, testimony having been taken by the Court, and the Court being otherwise fully advised in the premises, it is, thereupon,

✓ **ORDERED AND ADJUDGED** that the defendant be declared indigent and that the Office of the Public Defender for the Fourth Judicial Circuit of Florida is hereby appointed to represent said defendant.

✓ **ORDERED AND ADJUDGED** that the defendant shall pay an application fee in the amount of $50.00 to the Clerk of the Circuit Court in Room M-106 for misdemeanor cases and Room M-101 for felony cases, Duval County Courthouse, 330 E. Bay Street, Jacksonville, Florida 32202 no later than seven days from the date of this order. If the fee is not paid by that date, the Court will inquire of the defendant concerning the circumstances of the nonpayment. The Court may then order the fee to be paid forthwith or include the fee in any lien subsequently filed in this case.

___ **ORDERED AND ADJUDGED** that pursuant to section 27.512, Florida Statutes, the defendant is charged with a violation of a municipal ordinance or a misdemeanor, the defendant will not be imprisoned if convicted in this case; and, there being no legal requirement for the appointment of counsel, the said defendant has been advised that he/she may proceed without counsel, or, with retained counsel of the defendant's choice.

DONE AND ORDERED this 4 day of June, 20 11

Haddin A Mahan

CIRCUIT/COUNTY JUDGE

WHITE COPY-CLERK PINK COPY- PUBLIC DEFENDER YELLOW COPY- DEFEN

EXHIBIT
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B (b)

7/21

STATE OF FLORIDA

v.

Cristian Fernandez

FILED
JUN 08 2011
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO. 11-6222 CF

DIVISION CR-6

WAIVER OF SPEEDY TRIAL

Comes now the defendent - together with attorney - and hereby waives the right of speedy trial as provided by the Constitution of the United States and the State of Florida, Florida Statute 918.015, Rule 3.191 of the Florida Rules of Criminal Procedure and other applicable provisions of the Florida Statutes and F.R.C.P.

This Waiver of Speedy Trial is freely and voluntarily made for the reason that it is considered to be in the best interest of the defendant.

☒ This is an unlimited waiver of speedy trial in this case.

☐ This is a limited waiver of speedy trial for the period of _____

My attorney and I have signed this waiver of speedy trial in Jacksonville, Duval County, Florida, on June 8, 2011.

Attorney for Defendant

Defendant

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IN COMPUTER
E. O.

CIRCUIT JUDGE

My signature as Circuit Judge is certification that the waiver of speedy trial was freely, voluntarily and knowingly made - and it is hereby approved and accepted.

(Hudson Olliff, Circuit Judge, 4th revised Form #12 (10-90), filed with Florida Bar Center)

EXHIBIT
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B (c)

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT IN
AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CRISTIAN FERNANDEZ
_____/

CASE NO: 16-2011-CF–006222-AXXX-MA
DIVISION: CR-G

ORDER CONCERNING TRANSFER

On June 24, 2011, a hearing was held in this case by the Chief Judge to examine the status of the inmate. Such hearing was deemed necessary and authorized by Rules 2.215(b)(8) and 2.215(b)(6), Florida Rules of Judicial Administration. Having heard arguments of the parties and relevant testimony of the witnesses, the Court makes the following findings of facts and conclusions of law:

1. The psychological report prepared by the State's physician, found that the child, while 12 years old, is emotionally and psychologically younger than that age.

2. Tara Wildes, Chief of the Pretrial Detention Facility, Jacksonville Sheriff's Office, testified that the child arrived at the Facility on June 3, 2011 and they needed to place him in isolation for his own protection. He is still being held in isolation to this date. Chief Wildes also testified that the average length of detention before trial for similarly charged adults is 360 days. She hoped he would not be in isolation that long, but could not guarantee same.

3. Florida Statute § 985.56(1) provides that when an indictment is returned on a child of any age who is charged with a violation of state law punishable by death or by life imprisonment,

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the petition for delinquency must be dismissed and the child must be tried and handled in every respect as an adult.

4. Chief Wildes testified that she is unable to treat this child the same as other similarly situated adults. For example, he has had no contacts with his peers. She is unable to provide educational opportunities.

5. The Court also heard testimony from Rick Bedson, Regional Director of the Department of Juvenile Justice, who is familiar with this Defendant. Director Bedson testified that the Defendant had been placed in the general population of the Juvenile Detention Facility (JDF) prior to being certified as an adult and being transferred to the Pretrial Detention Facility. Director Bedson also testified that this 12 year old child is small in stature for his age.

He further testified that the JDF had provided, and is able to provide, schooling opportunities, mental health counseling, behavior management, suicide precautions, and peer contact, which appear to be all things stated in the State psychological report (attached hereto as a sealed instrument) necessary for the Defendant's mental well being.

Director Bedson testified that Defendant responded well at the JDF and had no significant problems while he was detained at that facility. He further testified that upon order of the Court, they would be willing to provide the necessary accommodations and services to the Defendant.

6. There are no other juvenile inmates who are being held and tried as adults in the Pretrial Detention Facility who are being held in isolation.

7. To the extent that this Order is inconsistent with Florida Statute § 985.56(1), then the Court finds that the statute, requiring him to be paced in an adult facility and handled as an adult is unconstitutional as applied to this child (who is 12 years old chronologically speaking, but even younger physically, emotionally and psychologically), and further detention in isolation at the Pretrial Detention Facility would be cruel and unusual punishment.

8. The Court finds that, pursuant to H.C. v. Jarrard, 786 F.2d 1080 (11 Cir. 1986), prolonged isolation of a juvenile may subject the Sheriff's Office/Pretrial Detention Facility to damages, including punitive damages for violating constitutionally guaranteed rights.

9. Having heard arguments of the parties and relevant testimony of the witnesses, it is therefore:

ORDERED AND ADJUDGED that:

The Defendant inmate, CRISTIAN FERNANDEZ, is authorized to be transferred from the Pretrial Detention Facility to the Juvenile Detention Facility and held until further order of the Court.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 27 day of June, 2011.

DONALD R. MORAN, JR.
CHIEF JUDGE

cc. The State Attorney's Office
The Public Defender's Office
The Jacksonville Sheriff's Office, Tara Wildes, Chief
The Florida Department of Juvenile Justice Detention, Rick Bedson, Regional Director

Clerk

FILED 11 JUN 21 AM 11:15 JIM FULLER

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NUMBER: 16-2011-CF-~~00622~~ 6222-AXXX-MA

DIVISION: CR-G

STATE OF FLORIDA

vs.

CRISTIAN FERNANDEZ

FILED IN COMPUTER E. O.

MOTION TO DISQUALIFY JUDGE

The Defendant, CRISTIAN FERNANDEZ, by and through the undersigned attorney, the Public Defender of the Fourth Judicial Circuit of Florida, pursuant to Rule 2.330, Florida Rules of Judicial Administration, moves that the judge presently assigned in this case, the Honorable Elizabeth A. Senterfitt, disqualify herself from presiding any further in this cause. In support thereof, the undersigned attorney states as follows:

FACTS

1. The Defendant, CRISTIAN FERNANDEZ is a juvenile indicted for first degree murder and aggravated child abuse.

2. On June 3, 2011, the Defendant was transferred to the Duval County Jail ("Jail") to await trial.

3. The Defendant is a twelve-year-old boy, and is the youngest prisoner held in the Jail. To protect him from older and more dangerous inmates, the Jail keeps him in the fourth floor's isolation unit. Here he sits in solitary confinement, held in his cell 23 hours a day. Such isolation has been shown to create serious psychological problems. In addition, as a result of the extraordinary and unique circumstances, his presence in the Jail disrupts its normal functioning by absorbing scarce resources and requiring additional attention from correctional officers.

EXHIBIT
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4. The aforementioned conditions of confinement violate the Defendant's Fourteenth Amendment rights to due process as a twelve-year-old pretrial detainee.

5. In seeking to address these conditions of confinement, on June 15, 2011, Defense Counsel spoke with Jacksonville Sheriff's Office ("JSO) Chief Tara Wildes and requested she provide the JSO's consent to transfer the Defendant to a juvenile facility.

6. Chief Wildes informed defense counsel that she could not give official consent because it was either Undersheriff Senterfitt's or Sheriff Rutherford's decision.

7. Also, in seeking permission to photograph and videotape the conditions of confinement, defense counsel was told a decision would rest with the Undersheriff or the Sheriff.

8. Undersheriff Dwain E. Senterfitt is married to the Honorable Elizabeth A. Senterfitt.

9. The Defendant believes that the above-mentioned facts constitute an appearance of impropriety and, as such, fear that the Judge cannot be fair and impartial and that the Defendant will not receive a fair trial or disposition.

WHEREFORE, the undersigned attorney and the Defendant, CRISTIAN FERNANDEZ, respectfully request that this Honorable Judge enter an order disqualifying herself and that she proceed no further herein.

I HEREBY CERTIFY that a copy of the above and foregoing Motion To Disqualify Judge has been furnished to the Office of the State Attorney, by hand, this 20th day of June, 2011.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Matt Shirk 0195911
Public Defender

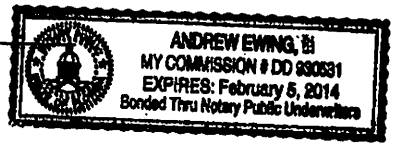
The undersigned attorney and the Defendant hereby swear and affirm under oath that the above facts are true and accurate to the best of their recollection and hereby certify that this "Motion to Disqualify Judge," is made in good faith and based on the fear that the Defendant will not receive a fair trial in this or any related cause.

Sworn and subscribed
before me this 17th
day of June, 2011.

Notary Public, State of Florida

Cristian Fernandez

My commission expires



FILED 11 JUN 21 AM 11:15 IN FULLER

Clerk 11/21

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NUMBER: 16-2011-CF-~~00622~~ 16222 AXXX-MA

DIVISION: CR-G

STATE OF FLORIDA

vs.

CRISTIAN FERNANDEZ

FILED IN COMPUTER E. O.

MOTION FOR REASONABLE PRETRIAL DETENTION

The Defendant, CRISTIAN FERNANDEZ, by and through the undersigned attorney, the Public Defender of the Fourth Judicial Circuit of Florida, pursuant to the Fourteenth Amendment to the United States Constitution, and the laws of the State of Florida, moves that this Honorable Court transfer the Defendant from the Duval County Jail ("Jail") to the Duval Regional Juvenile Detention Center ("DDC") to await trial. In support thereof, the undersigned attorney states as follows:

FACTS

1. On June 2, 2011, the Defendant, a twelve-year-old boy, was indicted on one count of first degree murder and one count of aggravated child abuse. After his initial arrest, he was held at DDC from March 15, 2011 until June 3, 2011. At DDC, Cristian continued his education, interacted with other children, and received treatment from mental health experts.

2. Cristian performed well in DDC's environment: during his nearly three-month stay, he had only one brief disciplinary confinement, which stemmed from an altercation involving another youth. Otherwise, he had no behavior problems at DDC.

3. On June 3, 2011, Cristian was transferred to the Jail, where he remains today. Cristian is the youngest prisoner held in the Jail. Of the 65 child inmates held in the Jail as of June 9, 2011, 35, or 54%, are seventeen years old, while another 22, or 34%, are sixteen years old. As a

EXHIBIT Composite B (f)

result, 83% of the children housed in the jail are sixteen or seventeen years old, and the average age of youths in the Jail is 16.3. Cristian is the only twelve year old in the Jail, which holds no thirteen year-olds, 6 fourteen-year-olds, and 2 fifteen-year-olds. On average, juveniles held at the jail are 5'7'' tall and weigh 147 pounds. The Jail lists Cristian's height at 5'1'', but other measurements indicate he stands less than 5 feet tall. Cristian's weight is listed at 140 pounds, but he has lost a significant, visibly noticeable amount since entering isolation.

3. The Jail holds Cristian in solitary confinement to separate and protect him from older, more dangerous prisoners. Cristian spends 23 hours a day behind a steel door in his isolation block cell, only being released for an hour once a day for individual recreation on a cement court. On or about June 10, 2011, the Jail began work to maintain and paint the court, and he was denied his hour of recreation for at least a week. Instead, the twelve-year-old boy remained in isolation around the clock.

4. Cristian's cell has no open bars or windows save the door's one-foot square observation portal. Despite this isolation, the Jail does not maintain true "sight and sound" separation as required by Florida Statute section 985.265(5). Cristian can see and hear trustees as they clean the floor, give haircuts to other prisoners, and conduct other duties. On multiple occasions, Cristian has heard other inmates discussing his case, commenting on the absurdity of his circumstances, and mentioning that he reminds them of their own sons. Cristian hears calls from adults in other isolation cells, who he can also see when he enters and exits his cell.

5. In isolation, Cristian has only sporadic access to mental health counselors and educational materials. He can no longer see the mental health counselor that had successfully worked with him at DDC. In keeping with jail protocol, outsiders are not permitted to give him books and learning materials unless they are shipped directly from a publisher or approved retailer.

6. Cristian cannot receive proper hygiene and grooming services while in isolation. Typically, trusties provide haircuts for other prisoners, but because of statutorily mandated "sight and sound" separation, the Jail must choose between either keeping Cristian from receiving a haircut or impermissibly allowing contact with adult prisoners.

7. Courts recognize that prolonged isolation presents a grave threat to a child's psychological and physical health. "Persuasive evidence" suggests "that solitary confinement under degrading conditions has an especially devastating impact upon a minor's sense of identity." Thompson v. Montemuro, 383 F. Supp. 1200, 1204 (E.D. Pa. 1974). "To confine a boy without

exercise, always indoors, almost always in a small cell, with little in the way of education or reading materials, and virtually no visitors from the outside world is to rot away the health of his body, mind, and spirit." Lollis v. New York State Dep't of Social Services, 322 F. Supp. 473, 482 (S.D.N.Y 1970).

8. Cristian was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") in 3rd grade, and has in the past also exhibited signs of depression. Confinement in a tiny cell is especially restrictive for a child with ADHD, and the depressive effects of isolation can have a particularly acute impact on those with a history of depression.

9. Every study of non-voluntary solitary confinement lasting longer than ten days has revealed negative psychological effects. Even among adults, typical problems include "hypertension, uncontrollable anger, hallucinations, psychosis, chronic depression, and suicidal thoughts and behavior," in addition to "sleep disturbances, impaired cognition, anxiety, hostility, minor forms of psychopathology, heightened frictions and social conflict among members of the confined group, and potential long-term animosities that could result in deterioration of interpersonal and familial relationships." Craig Haney and Mona Lynch, Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 506, 531 (1997).

10. In part because of ethical concerns associated with subjecting children to isolated conditions, little research has been done into the effects of solitary confinement on juveniles. Researchers do know that juveniles are 36 times more likely to commit suicide in an adult jail than in a juvenile detention facility, and 19 times more likely to commit suicide in an adult jail than youth in the general population. Neelum Arya, Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America. Campaign for Youth Justice (November 2007).

11. The effects of isolation on another Florida juvenile charged as an adult provide evidence of the serious psychological harm that can result from solitary confinement of children. Ian Manuel has served nearly all of his time in solitary confinement since entering prison at fourteen. Unlike Cristian, Manuel had already been convicted of a crime, and was placed in isolation because of repeated behavioral issues.

> "Now 29, Manuel has spent half his life in a concrete box the size of a walk-in closet. His food comes through a slot in the door. He never sees another inmate. Out of boredom he cuts himself just to watch the blood trickle. Attorneys who advocate on behalf of prisoners call Manuel 'the poster boy' for the ill effects of solitary confinement . . . . Manuel told the judge

> that in isolation he has become a "cutter," slicing his arms and legs with whatever sharp object he can find – a fragment of a toothpaste tube or a tiny piece of glass . . . . In the past year, Ian Manuel has attempted suicide five times. In late August he slit his wrists. A prison nurse closed the wounds with superglue and returned him to his solitary cell. When the judge asked him why he attempted suicide, Manuel said, 'You kind of lose hope.'" Meg Laughlin, "Does separation equal suffering?" *The St. Petersburg Times* (December 17, 2006).

12. Holding the Defendant in isolation drains the Jail's scarce money, resources, and manpower. According to Jail protocol, corrections officers must observe all meetings between Cristian and members of his legal team, which takes officers away from other duties for hours at a time. Unlike typical cases, Cristian's situation has repeatedly demanded the attention of JSO Chief Tara Wildes and other high-ranking officials with the JSO.

13. Sections 985.565 and 985.256(2) of the Florida Statutes indicate that children charged as adults should be held in adult jails. However, section 985.256(2) delineates minimum standards for the detention of juveniles at adult facilities:

> "The child shall be housed separately from adult inmates to prohibit a child from having regular contact with incarcerated adults, including trustees. "Regular contact" means sight and sound contact. Separation of children from adults shall permit no more than haphazard or accidental contact. The receiving jail or other facility shall contain a separate section for children and shall have an adequate staff to supervise and monitor the child's activities at all times. Supervision and monitoring of children includes physical observation and documented checks by jail or receiving facility supervisory personnel at intervals not to exceed 15 minutes." 985.265(5); see also Miller v. Carson. 392 F. Supp. 515 (M.D. Fla. 1975).

Since the Jail does not comply with statutory mandates, and since forcing the Jail to comply would prove prohibitively expensive and would sap scarce resources, the Defendant should be transferred to a facility like DDC that can hold him safely as he awaits trial.

14. In addition, despite statutes suggesting that children charged as adults be held in adult jails, the court in State ex. rel. Powers v. Schwartz concluded that

> ". . . if the indicted juvenile's health and safety is so endangered at a pre-trial adult detention facility that his or her constitutional right to be free from cruel and unusual punishment is being violated, the trial judge has a duty to enter whatever orders are necessary to assure proper confinement conditions which meet minimum constitutional standards." 355 So. 2d 460, 461 (Fla. 3d. DCA 1978).

Steps could include "transfer of the juvenile to another available confinement facility as a possible option in discharging that duty." Id.

15. "Solitary confinement of young adults is unconstitutional." Feliciano v. Barcelo, 497 F. Supp. 14, 35 (D.P.R. 1979) (ordering the closure of "isolation cells" in a Puerto Rican prison). Cristian's solitary confinement in the Jail violates his Fourteenth Amendment rights as a pretrial detainee to be free from punishment, and no other options at that facility satisfy minimum constitutional standards.

16. "The Fourteenth Amendment prohibits all punishment of pretrial detainees." Demery v. Arpaio, 378 F.3d 1020, 1029 (9th Cir. 2004). Absent an express intent to punish, a disability is impermissibly imposed for the purpose of punishment, and not as an incident of some other legitimate governmental purpose, if (1) no alternative purpose to which the restriction may rationally be connected is assignable for it, or if (2) the restriction appears excessive in relation to the alternative purpose assigned to it. Schall v. Martin, 467 U.S. 253, 269 (1984).

17. First, the solitary confinement of the Defendant serves no alternative, legitimate governmental purpose besides punishment. The state may have interests in ensuring the presence of defendants at trial and in providing heightened security for children charged as adults, but holding Cristian at the Jail instead of at DDC advances neither interest. Cristian is not an escape risk, and needs no extra security to ensure his appearance in court. Further, as a twelve-year-old, Cristian is a vulnerable child who presents little threat to other detainees, as evidenced by his record from three months at DDC and his time in school. Since the state has no legitimate interests in housing the defendant at the Jail, his confinement there amounts to constitutionally impermissible punishment under the Fourteenth Amendment.

18. Second, even if the state's action serves a legitimate government goal, the severity of solitary confinement amounts to punishment because it appears highly "excessive in relation to any alternative purpose." Bell v. Wolfish, 441 U.S. 520, 538 (1979). "It is still necessary to determine whether the terms and conditions of confinement . . . are in fact compatible with those [alternative] purposes." Schall, 467 U.S. at 269. The Schall court upheld fairly standard juvenile pretrial detention as consistent with legitimate purposes when the maximum possible detention of a child in a juvenile facility was seventeen days, and for less serious crimes, six days. Id. at 270. Secure detention, when children were assigned to separate dorms based on "age, size, and behavior," and in which they engaged "in educational and recreational programs and counseling sessions run by trained social workers," was consistent with state regulatory objectives. Id. at 271.

For more exceptional cases, though, the court noted "that in some circumstances detention of a juvenile would not pass constitutional muster." Id. at 273. These are just such circumstances.

19. Under this second step, any pretrial detention that provides less than the "minimal civilized measure of life's necessities" fails constitutional muster. Bell, 441 U.S. at 536. As the Eleventh Circuit explained in Hamm v. De Kalb County,

> "[A] state's decision to maintain at a reasonable level the quality of food, living space, and medical care rather than improve or increase its provisions of those necessities serves a legitimate purpose: to reasonably limit the cost of detention. . . . Nonetheless, there must be a minimum standard for providing detainees with basic necessities, the failure to meet which amounts to a violation of due process. . . . [C]ertain legitimate state objectives may justify the imposition of certain conditions only if those conditions are not too severe." 774 F.2d 1567 (11th Cir. 1985).

Since conditions at the Jail are too severe for a twelve-year-old boy like Cristian to safely endure, they fall below the minimum constitutionally acceptable standard.

20. State and federal courts have stepped in to prevent juveniles from similarly suffering in solitary confinement. See, eg., Lollis v. New York State Dep't of Social Services, 322 F. Supp. 473, 482 (S.D.N.Y 1970) (holding "a two-week confinement of a fourteen-year old girl in a stripped room in night clothes with no recreational facilities or even reading matter" violated the Constitution); People v. Owen, 295 N.E.2d 455 (Ill. 1973) (precluding the use of lengthy periods of solitary confinement for juveniles without prior institutional hearings); State v. Werner, 242 S.E.2d 907 (W.Va. 1978) (finding use of punitive practices like solitary confinement with juveniles prohibited by constitution).

21. In such an exceptional case, the state legislature's declared intent should serve as a guide. Section 985.01 declares "[t]he purposes of this chapter are: . . . to promote the health and well-being of all children under the state's care" while ensuring the "recognition, protection, and enforcement of their constitutional and other legal rights." Further, the statute seeks to "assure that the sentencing and placement of a child tried as an adult be appropriate . . ., and that the proceedings and procedures applicable to such sentencing and placement be applied within the full framework of constitutional standards of fundamental fairness and due process." 985.01(1)(e)(2). In describing the "[l]egislative intent for the juvenile justice system," section 985.02 announces the need to provide Florida's children with "[p]rotection from abuse, neglect and exploitation," "a safe and nurturing environment which will preserve a sense of personal dignity and integrity," "effective treatment to address physical, social, and emotional needs," and "equal

opportunity and access to quality and effective education." The statute continues to find that "a significant number of children have been adjudicated in adult criminal court and placed in this state's prisons where programs are inadequate to meet their rehabilitative needs and where space is needed for adult offenders." 985.02(5).

22. The Defendant believes that the above-mentioned facts establish that conditions in the Jail endanger the Defendant's mental and physical health, prevent his access to adequate educational and mental health services, divert scarce resources from an already overcrowded facility, and violate his constitutional rights protected by the Fourteenth Amendment.

WHEREFORE, the undersigned attorney and the Defendant, CRISTIAN FERNANDEZ, respectfully request that this Honorable Judge enter an order removing the Defendant from the Jail and returning him to DDC to await trial.

I HEREBY CERTIFY that a copy of the above and foregoing Motion for Reasonable Pretrial Detention has been furnished to the Office of the State Attorney, by hand, this 20th day of June, 2011.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Matt Shirk 0195911
Public Defender

FILED 11 JUN 30 PM 12:03 JIM FULLER

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NUMBER: 16-2011-CF-006222-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

vs.

CRISTIAN FERNANDEZ

MOTION TO CLARIFY PRETRIAL PUBLICITY ORDER

The Defendant, CRISTIAN FERNANDEZ, by and through the undersigned attorney and pursuant to any and all applicable Florida statutes and rules of criminal procedure, moves that this Honorable Court amend the existing pretrial publicity order to align directly with Rule 4-3.6(a) of the Florida Rules of Professional Conduct. In support thereof, the undersigned attorney states as follows:

1. At the arraignment of the Defendant on June 8, 2011, the State sought to limit extrajudicial statements after expressing concern that pretrial comments could be "in violation of the Rules of Professional Conduct" and had the potential to prejudice a potential jury pool.

2. During the arraignment, the presiding Judge responded to the State's request by ordering the parties not discuss this case with anyone other than those counsel deem necessary for the preparation of their case.

3. After the pretrial publicity order was issued on June 8, the Defendant's case has remained the subject of intense public interest. Numerous local, state, and national media sources have discussed the case, drawing on bits of information released in court filings and gleaned from independent investigations. Without the opportunity for counsel to refute false information or

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further explain the complex case, the fairness of a future jury trial is endangered by the proliferation of incorrect or misleading stories.

4. Since it does not elaborate on whom counsel may "deem necessary for the preparation of their case," and since it provides no further guidance regarding the refutation of false information, the existing order fails to specify (or aid counsel) in how counsel should respond to incorrect and potentially prejudicial news inquiries and/or stories.

5. Rule 4-3.6(a) of the Florida Rules of Professional Conduct provides that:

> "A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding."

6. Counsel has a First Amendment right to freedom of speech. Rodriguez v. Feinstein, 734 So. 2d 1162, 1164 (Fla. 3d DCA 1999). When a court has made no findings that an order restraining speech is necessary to ensure a fair trial, and where the order is "not narrowly tailored to preclude only extra-judicial statements that are substantially likely to materially prejudice the trial," that order infringes on First Amendment rights. Id. In Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991), the United States Supreme Court established a framework for acceptable restraints, holding that the "'substantial likelihood of material prejudice standard' constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials." The Florida Supreme Court approved the Gentile standard by incorporating it into Rule 4-3.6 of the Florida Rules of Professional Conduct. The Florida Bar re: Amendments to Rules Regulating the Florida Bar, 644 So. 2d 282, 283 (Fla. 1994).

7. On June 20, 2011, State Attorney Angela Corey told defense counsel that she consented to amending the existing pretrial publicity to align directly with the Florida Rules of Professional Conduct.

WHEREFORE, the undersigned attorney and the Defendant, CRISTIAN FERNANDEZ, respectfully request that this Court permit counsel to make extrajudicial statements in compliance and accordance with the Florida Rules of Professional Conduct.

I HEREBY CERTIFY that a copy of the above and foregoing Motion To Clarify Pretrial Publicity Order has been furnished to the Office of the State Attorney, by hand, this 29th day of June, 2011.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Refik Eler, Fla. Bar # 642126
Chief Assistant Public Defender

9/1

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NUMBER: 16-2011-CF-006222-AXXX-MA

DIVISION: CR-D

FILED
AUG 02 2011
CLERK CIRCUIT COURT

STATE OF FLORIDA

vs.

CRISTIAN FERNANDEZ

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO CLARIFY PRETRIAL PUBLICITY ORDER

The Defendant, CRISTIAN FERNANDEZ, by and through undersigned counsel, the Public Defender of the Fourth Judicial Circuit of Florida, and pursuant to any and all applicable Florida statutes and rules of criminal procedure, hereby submits the following Memorandum of Law in Support of Defendant's Motion to Clarify this Court's oral order on June 8, 2011, and the written temporary protective order entered on June 29, 2011, *nunc pro tunc* to June 8, 2011.

I. INTRODUCTION AND RELEVANT FACTS

This case involves the youngest murder defendant in Duval County history. Understandably, it has attracted significant public attention and spurred debate on important public issues regarding the rehabilitative potential of juveniles and the trial of juveniles as adults. In response to the State's verbal request to limit extrajudicial statements at the Defendant's arraignment on June 8, 2011, Judge Elizabeth Senterfitt issued an oral order prohibiting "the parties" from "discuss[ing] this case with anyone other than those counsel deem necessary for the preparation of their case." Subsequently, Judge Senterfitt entered a written temporary protective order prohibiting counsel from "discuss[ing] this case with anyone other than those persons

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deemed necessary by counsel for the preparation of their respective case." Effectively a gag order on all counsel, the order does not permit counsel to speak to *anyone* about this case, except to persons deemed "necessary" to the "preparation of [the] case."

Under First Amendment jurisprudence, a gag order on counsel in a criminal case must be narrowly tailored to address specific evidence of extrajudicial statements found to pose a "substantial likelihood of material prejudice" to a fair trial. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075–76 (1991). Rule 4-3.6 of the Florida Rules of Professional Conduct ("Rule 4-3.6") embodies this constitutional standard governing permissible restrictions on attorney speech as approved in Gentile. Here, the instant order is not limited to prohibiting only those extrajudicial statements that would in fact pose a substantial likelihood of material prejudice to a fair trial and does not account for the many months that would pass before trial. Thus, the order is unconstitutionally overbroad.

The Public Defender is mindful of the Court's concern over the dissemination of information from counsel in this case, but the current order prohibits counsel from making even appropriate and constitutionally permissible comments. The circulation of misleading information in the press and throughout the community requires correction to prevent prejudice to the Defendant. Therefore, Defendant has brought an unopposed motion seeking clarification and requesting that the language of the current order be brought in line with Rule 4-3.6(a).

II. THE LEGAL STANDARD GOVERNING RESTRICTIONS ON ATTORNEY SPEECH

A. Attorney Speech May Be Constitutionally Proscribed Only upon a Showing that Such Speech Would Be "Substantially Likely" to "Materially Prejudice" an Adjudicative Proceeding

"In Florida, the limitations imposed by the court on communications between the media and lawyers and/or litigants must be for good cause to assure fair trials." Rodriguez ex rel.

Posso-Rodriguez v. Feinstein, 734 So. 2d 1162, 1164 (Fla. 3d DCA 1999). To find good cause, the Court must make findings, based on evidence, that "extrajudicial statements made by counsel or the parties pose a substantial or imminent threat to a fair trial." E.I. Du Pont de Nemours and Co. v. Aquamar, S.A., 33 So. 3d 839, 841 (Fla. 4th DCA 2010); see also News-Press Publ'g Co. v. Hayes, 493 So. 2d 1, 2 (Fla. 2d DCA 1986) (quashing order restricting extrajudicial statements because it was entered *sua sponte* without a proper evidentiary hearing).

This standard is derived from a long line of U.S. Supreme Court First Amendment cases delineating the trial court's power to protect against prejudicial pretrial publicity, culminating in Gentile v. State Bar of Nevada. 501 U.S. 1030 (1991); see also Sheppard v. Maxwell, 384 U.S. 333 (1966); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). These cases recognize that while attorneys, as officers of the court, may be subject to greater speech regulation than the press, attorneys still have First Amendment rights. Gentile, 501 U.S. at 1074; see also U.S. v. Salameh, 992 F.2d 445, 447 (2d Cir. 1993). Indeed, "[a]n attorney's duties do not begin inside the courtroom door." Gentile, 501 U.S. at 1043 (Kennedy, J.). "A defense attorney may pursue lawful strategies to obtain dismissal or an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried." Id. at 1043 (Kennedy, J.). Speech critical of the exercise of the State's power (such as the State's decision to prosecute a juvenile as an adult), "l[ies] at the core of the First Amendment." See Butterworth v. Smith, 494 U.S. 624, 632 (1990). Thus, consistent with an attorney's ethical obligations, representation of a client's interests may transcend the courtroom.

Recognizing that a line must be drawn, the U.S. Supreme Court approved the "substantial likelihood of material prejudice" standard as "a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."

Gentile, 501 U.S. at 1075; see also Feinstein, 734 So. 2d at 1164. The standard "imposes only narrow and necessary limitations on lawyers' speech" and is aimed at "two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire . . . ." Gentile, 501 U.S. at 1075. Such a standard is "narrowly tailored" to address these two evils because "it applies *only* to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case . . . ." Id. at 1076 (emphasis added). This standard closely polices restrictions on speech: "if interpreted in a *proper and narrow manner*, for instance, to prevent an attorney from releasing information of grave prejudice on the eve of jury selection, the phrase substantial likelihood of material prejudice might punish *only speech that creates a danger of imminent and substantial harm.*" Gentile, 501 U.S. at 1036 (Kennedy, J.) (commenting on the ABA's version of the rule) (emphasis added).

Following Gentile, the Florida Bar amended Rule 4-3.6. See The Florida Bar re: Amendments to the Rules Regulating the Florida Bar No. 83,222, 644 So. 2d 282 (Fla. 1994) ("[t]he proposed amendment of this rule follows . . . Gentile v. State Bar of Nevada" and "incorporates the 'substantial likelihood of material prejudice' standard."). Bar Rule 4-3.6 now provides,

> "A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding."

The Comment to Rule 4-3.6 acknowledges the "difficult[y] [in] strik[ing] a balance between protecting the right to a fair trial and safeguarding the right of free expression." See also ABA

Model Rules of Professional Conduct ("ABA Model Rules"), Rule 3.6, com. 1 (same). The Comment further explains,

> "The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy."

See Comment to Rule 4-3.6. Rule 4-3.6, following Gentile, thus "permits all comment to the press absent a 'substantial likelihood of materially prejudicing an adjudicative proceeding.'" Gentile, 501 U.S. at 1056 (Kennedy, J.).

B. The Court Must Consider the Context, Timing and Circumstances of the Attorney Speech in Deciding Whether There Is a Substantial Likelihood of Material Prejudice

Whether a particular statement will have a "substantial likelihood of materially prejudicing an adjudicative proceeding" depends on its context and circumstances. Gentile, 501 U.S. at 1042–1043 (Kennedy, J.). For instance, where information has been misconstrued in the press, attorneys to the pending case may be uniquely positioned to diffuse the potential prejudicial effect of such misinformation. Indeed, consistent with Gentile, the ABA's pretrial publicity rule expressly permits speech that counters misleading information in order to protect a defendant: "a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." ABA Rule 3.6(c). States which have not adopted an express provision exempting such "rebuttal" speech do so implicitly as part of the analysis of "materially prejudice." See, e.g., Comment 3 to the Texas Disciplinary Rules of Professional Conduct, Rule 3.07(a) ("The existence of 'material prejudice' normally depends on the circumstances in which a particular statement is made. For example, an otherwise objectionable statement may be

excusable if reasonably calculated to counter the unfair prejudicial effect of another public statement. Applicable constitutional principles require that the disciplinary standard in this area retain the flexibility needed to take such unique considerations into account.").

The "timing" of counsel's comments relative to the anticipated trial date is also "crucial" in assessing "possible prejudice." Gentile, 501 U.S. at 1044 (statement made months from trial weighed against finding of prejudice). Thus, whether particular statements rise to the level of "substantial likelihood of material prejudice" depends on the timing and context of the statements under the specific circumstances of the case. See Feinstein, 734 So. 2d at 1164 (the inquiry requires a "case by case" determination); see also United States v. Gonzalez, 85 F. Supp. 2d 1306, 1309 (S.D. Fla. 1999) ("By the time the case comes up for trial, in several months, it is safe to predict that any effects of the present publicity will have passed . . . .").

Attorney comments about the judicial process and the allegations in a pending case are important and beneficial to the public dialogue "[b]ecause attorneys . . . are trained in [the] complexities [of the criminal justice system]" and "hold unique qualifications as a source of information about pending cases." Gentile, 501 U.S. at 1056 (Kennedy, J.). As the Supreme Court concluded,

> "To the extent the press and public rely upon attorneys for information because attorneys are well informed, this may prove the value to the public of speech by members of the bar. If the dangers of their speech arise from its persuasiveness, from their ability to explain the judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent."

Id. at 1056–57. Attorney speech can enhance the fairness of a future trial. Restricting such speech infringes on counsel's constitutional rights and frustrates attempts to avoid the spread of prejudicial information.

C. An Order Restricting Speech Requires Additional Factual Findings That The Order Is Necessary And Would Be Effective In Preventing Prejudice

Even if the Court were to find that this case is one of those "relatively rare" cases in which there is sufficient proof of a prejudicial effect, Nebraska Press, 427 U.S. at 554, an order further restricting counsel's speech may not be entered without first considering (1) alternatives to restricting speech, other than a change of venue, that would protect a fair trial; and (2) the efficacy of the order in preventing the prejudicial pretrial publicity. See Feinstein, 734 So. 2d at 1165. A gag order on trial participants must be based on factual findings demonstrating that the order is necessary and that the order would actually work. Id.; see also Nebraska Press, 427 U.S. at 562, 566, 568–69 (requiring that a court assess the actual evidence of the substantial probability of prejudice, make factual findings as to alternatives to prior restraint, and assess the probable efficacy of the proposed order).

III. THE CURRENT ORDER NEEDS CLARIFICATION TO PERMIT ATTORNEYS TO COMMENT ON THE CASE CONSISTENT WITH THEIR FIRST AMENDMENT RIGHTS AS EMBODIED IN FLORIDA BAR RULE 4-3.6(A)

Far from being narrowly tailored, the current order begins with a complete ban on attorney speech and carves out a narrow exception to allow the attorneys to prepare their cases. Such an order cannot pass constitutional muster, particularly considering the Feinstein factors: 1) there has been no evidentiary finding that pretrial statements by counsel would cause a "substantial likelihood of material prejudice"; 2) there are no findings that alternatives to the existing order would not suffice to prevent such potential prejudice; and 3) the efficacy of the order is questionable since trial is still many months away. See Feinstein, 734 So. 2d at 1165 (vacating gag order that was "not narrowly tailored to protect the fairness of this particular trial" and where trial court "never considered less restrictive alternatives"); see also Salameh, 992 F.2d

at 446–47 (holding that a broad gag order on counsel, without any finding that alternatives were inadequate, was constitutionally impermissible).

Of particular concern are misleading "facts" which have been published by the press in recent weeks. For example, several news sources report that [redacted] Some reports appear to have extracted pieces from one of the Defendant's mental health evaluations without mentioning that the evaluation ultimately concluded that the Defendant can be rehabilitated. Already, public comments on these news stories reflect a gross misunderstanding of the Defendant and the case.[2]

Under the current order, Defendant's counsel cannot respond to these misleading reports or anything else that may be reported in the future. Meanwhile, *The Florida Times-Union* and other news sources will continue to follow the investigation and prosecution, likely interviewing investigators and other non-lawyers surrounding the case and relying on second-hand sources, fueling rumor, speculation and hearsay. This will not enhance the fairness of a trial, and depriving counsel of the ability to comment on the case could have the perverse effect of hindering a fair trial. As the Supreme Court has noted, even with a gag order in place, rumors

[1] See, e.g., [redacted] First Coast News, Youngest Jacksonville Murder Suspect Being Moved, available at http://www.firstcoastnews.com/news/article/208762/3/Youngest-Jacksonville-Murder-Suspect-Being-Moved (June 24, 2011); News 4 Jax, Judge Returns Boy to Juvenile Center, available at http://www.news4jax.com/news/28347200/detail.html (June 24, 2011).

[2] For example, numerous public comments on the news websites of the above-listed articles liken the Defendant to Charles Manson and Ottis Toole [redacted] These misconceptions hinder rather than further the public dialogue on the rehabilitative potential of juveniles and the propriety of trying juveniles as adults.

and gossip will circulate throughout a community. Nebraska Press, 427 U.S. at 567. "One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts." Id.

As to alternatives, this Court can protect a fair trial by less restrictive means than the current order. Defendant's proposed modification to the order will bring the order in line with the language of Rule 4-3.6 which tracks the constitutionally permissible line approved in Gentile. The State does not oppose the proposed modification.

Should the Court determine at some future time that a more restrictive order is necessary, the Court may issue such an order after making the prerequisite factual findings that: (1) extrajudicial statements in issue are substantially likely to materially prejudice a fair trial in this case; (2) additional restrictions under consideration are narrowly tailored to proscribing only the prejudicial speech; and (3) the restrictions under consideration would be effective in preventing prejudicial publicity. At this time, and on the facts presently before the Court, no such findings have been made nor could be made in these early proceedings.

IV. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court grant the pending Motion to Clarify and enter the concurrently lodged proposed order which aligns the Court's June 8, 2011 order with the language of Rule 4-3.6.

I HEREBY CERTIFY that a copy of the above and foregoing Motion To Clarify Pretrial Publicity Order has been furnished to the Office of the State Attorney, by hand, this 22nd day of July, 2011.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Matt Shirk 195911
Public Defender

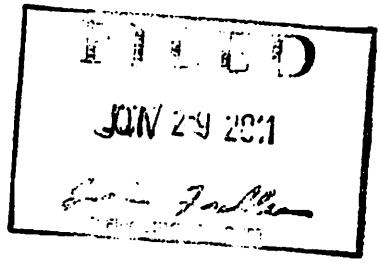
IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2011-CF-6222-AXXX
DIVISION: CR-G

STATE OF FLORIDA

vs.

CRISTIEN FERNANDEZ
_____/



TEMPORARY PROTECTIVE ORDER

This matter having come before the Court on June 8th, 2011 upon the State's oral Motion for Protective Order, and the court having heard arguments of counsel, and considered the stipulations of both parties, it is,

ORDERED AS FOLLOWS:

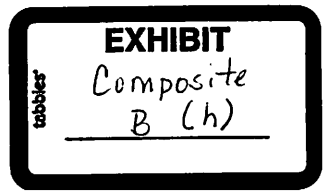
1. Considering there has been significant national, state and local print and television media coverage of the Defendant's criminal cases and significant internet comment, blogging and communication concerning the Defendant's cases by members of the public;

2. That in order to protect and preserve the Defendant 's right to a fair and impartial trial in the county where the crime was committed as provided for in Amendment VI of the United States Constitution, Art. 1, Sec. 16 of the Florida Constitution, and Florida Statutes, a protective order is necessary at this time;

3. That neither the State nor the Defense shall discuss this case with anyone other than those persons deemed necessary by counsel for the preparation of their respective case;

4. That all pre-trial proceedings and trial proceedings are exempt from this order and shall be open to the public as well as any court minutes, dockets or docket entries, and notices of the times and places of scheduled court proceedings;

5. That the provisions of this order shall be in effect until further order by the Court.



DONE AND ORDERED at Jacksonville, Duval County, Florida, this ___29th___ day of June, 2011, *nunc pro tunc* to June, 8th, 2011.

ELIZABETH A. SENTERFITT
Circuit Court Judge

Copies furnished to:

Office of the State Attorney

Public Defender's Office

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2011-CF-6222-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

v.

CRISTIAN FERNANDEZ,
Defendant.
_____/

FILED
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CLERK CIRCUIT COURT

AMENDED PROTECTIVE ORDER

This matter having come before the Court on June 8, 2011, upon the State's *ore tenus* Motion for Protective Order and subsequently, upon the Defendant's Motion to Clarify Pretrial Publicity Order, filed June 30, 2011 and Memorandum of Law in Support of Defendant's Motion to Clarify Pretrial Publicity Order, filed August 2, 2011, and the parties' proposed Consent Order Amending Pretrial Publicity Order, and the Court having heard arguments of counsel and considered the stipulations of both parties, the Court makes the following findings of fact and conclusions of law:

1. The Court finds that a protective order is necessary at this time to protect and preserve the Defendant's right to a fair and impartial trial in the county where the crime was committed as provided for in Amendment VI of the United States Constitution, Art. I, Sec. 16 of the Florida Constitution, and Florida Statutes.

2. The Court is aware that any such protective order must be for good cause to assure a fair trial and should be narrowly tailored to preclude only those extra-judicial statements which are substantially likely to materially prejudice the trial.

3. There were several collateral bad acts allegedly committed by the Defendant that

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were revealed in court records that were exempt from public disclosure but were inadvertently disclosed to the public. These acts include, but are not limited to, the following: [redacted]

4. As a result, these collateral bad acts have been discussed by various news media, as set forth in detail in the Defendant's Memorandum of Law in Support of Defendant's Motion to Clarify Pretrial Publicity Order.

5. The Court finds that these collateral bad acts would not likely be admissible at trial in the case *sub judice*, and any further discussion of such acts between the media and counsel for either party or the Defendant, would pose a substantial and imminent threat to the Defendant's ability to receive a fair trial.

6. The Court is mindful of the Defendant's desire to respond to misleading news accounts of these acts. However, any potential juror who has already heard about these acts, whether misleading or accurate, would not likely serve as a juror in the case. On the other hand, should the Court permit the Defense to respond to the misleading accounts, potential jurors that may have heard nothing about these collateral acts will be tainted.

7. Therefore, counsel for both parties and the Defendant are prohibited from discussing these collateral bad acts with anyone other than those persons deemed necessary by counsel for the preparation of their respective cases.

8. As to extra-judicial statements regarding issues other than those specifically addressed by the Court in this Order, counsel for both parties is ordered to comply with the Florida Rules of Professional Conduct, including Rule 4-3.6(a), which provides:

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

DONE AND ORDERED in Chambers in Jacksonville, Duval County, Florida this 4 day of August, 2011.

Mallory D. Cooper
CIRCUIT COURT JUDGE

cc:
Office of the State Attorney
Office of the Public Defender

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NOS.: 16-2011-CF-6222
16-2012-CF-136
DIVISION: CR-D

STATE OF FLORIDA

v.

CRISTIAN FERNANDEZ,

Defendant.
_____/

MOTION FOR SUBSTITUTION OF COUNSEL UPON THE DIRECTION OF THE GUARDIAN AD LITEM

COMES NOW Cristian Fernandez, through undersigned counsel upon the direction of the guardian ad litem, Hugh Cotney, Esq., who seeks to substitute the law firms referenced below for the Public Defender in and for the Fourth Judicial Circuit of Florida in connection with case numbers 16-2011-CF-6222 and 16-2012-CF-136, and states:

1. The Public Defender in and for the Fourth Judicial Circuit of Florida was initially appointed to represent Cristian Fernandez in connection with case numbers 16-2011-CF-6222 and 16-2012-CF-136.

2. Hugh Cotney, Esq., the court-appointed guardian ad litem for Cristian Fernandez in connection with both pending matters, has decided to retain the following law firms to represent Cristian Fernandez:

HOLLAND & KNIGHT LLP
George E. Schulz, Jr. Esq.
Florida Bar No. 169507
50 N. Laura Street, Ste. 3900
Jacksonville, Florida 32202

FILED IN COURT A. J.

and

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Adam M. Blank, Esq.
Florida Bar No. 58235
2099 Pennsylvania Ave. NW, Ste. 100
Washington, D.C. 20006

BEDELL, DITTMAR, DEVAULT, PILLANS & COXE, P.A.
Henry M. Coxe, III, Esq.
Florida Bar No. 155193
101 E. Adams Street
Jacksonville, Florida 32202

MCGUIREWOODS LLP
Donald D. Anderson, Esq.
Florida Bar No. 90557
50 N. Laura Street, Ste. 3300
Jacksonville, Florida 32202

and

Melissa W. Nelson, Esq.
Florida Bar No. 132853
50 N. Laura Street, Ste. 3300
Jacksonville, Florida 32202

CREED & GOWDY P.A.
Bryan Gowdy, Esq.
Florida Bar No. 176631
865 May Street
Jacksonville, Florida 32204

LAW OFFICE OF D. GRAY THOMAS, P.A.
D. Gray Thomas, Esq.
Florida Bar No. 956041
424 E. Monroe Street
Jacksonville, Florida 32202

3. As guardian ad litem, Mr. Cotney requests that the above law firms be substituted as counsel for the Public Defender in and for the Fourth Judicial Circuit.

4. The requested substitution of counsel will not adversely affect the State, and is not sought for any dilatory or improper purpose.

5. All further motions, pleadings, reports, correspondence and other communications, whether filed by the Court or any other party of interest, should be directed and forwarded to the above law firms.

WHEREFORE, undersigned counsel, upon the direction of the guardian ad litem, Hugh Cotney, Esq., request that the Court enter an Order substituting the law firms of Holland & Knight LLP, Bedell, Dittmar, DeVault, Pillans & Coxe, P.A., McGuireWoods LLP, Creed & Gowdy P.A., and Law Office of D. Gray Thomas, P.A., for the Public Defender in and for the Fourth Judicial Circuit in connection with case numbers 16-2011-CF-6222 and 16-2012-CF-136.

Dated: January 30, 2012

Respectfully submitted,

HOLLAND & KNIGHT LLP

George E. Schulz, Jr., Esq.
Florida Bar No. 169507
buddy.schulz@hklaw.com
50 North Laura Street, Suite 3900
Jacksonville, Florida 32202
(904) 353-2000 – Telephone
(904) 358-1872 – Facsimile

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(202) 955-3000 – Telephone
(202) 955-5564 – Facsimile

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(904) 353-9307 – Facsimile

MCGUIREWOODS LLP
Donald D. Anderson, Esq.
Florida Bar No. 90557
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Jacksonville, Florida 32202
(904) 798-3200 – Telephone
(904) 798-3207 – Facsimile

CREED & GOWDY P.A.
Bryan Gowdy, Esq.
Florida Bar No. 176631
865 May Street
Jacksonville, Florida 32204
(904) 350-0075 – Telephone
(904) 350-0086 – Facsimile

LAW OFFICE OF D. GRAY THOMAS, P.A.
D. Gray Thomas, Esq.
Florida Bar No. 956041
424 E. Monroe Street
Jacksonville, Florida 32202
(904) 634-0696 – Telephone
(904) 358-2850 – Facsimile

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Motion for Substitution of Counsel Upon the Direction of the Guardian ad Litem has been furnished, by hand, to **Hugh Cotney, Esq.**, 233 East Bay Street, Jacksonville, Florida 32202, the **Office of the State Attorney in and for the Fourth Judicial Circuit of Florida**, 220 East Bay Street, Jacksonville, Florida 32202, and **the Office of the Public Defender in and for the Fourth Judicial Circuit of Florida**, 407 N. Laura Street, Jacksonville, Florida 32202, this 30th day of January, 2012.

George E. Schulz, Jr., Esq.

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2011-CF-006222

DIVISION: CR-D

STATE OF FLORIDA

VS.

CRISTIAN FERNANDEZ

_____/

CONSENT ORDER APPOINTING GUARDIAN AD LITEM

Defendant, Cristian Fernandez, represented by the Public Defender of the Fourth Judicial Circuit, and the State of Florida, hereby consent to the appointment of a Guardian Ad Litem as evidenced by their consent herein.

Therefore, IT IS HEREBY AGREED by and between the Defendant and the State of Florida that:

1. Hugh Cotney, an attorney in good standing with the Florida Bar, is appointed to serve as Defendant's Guardian Ad Litem.

2. Confidential communications among and between the Defendant, his defense counsel and the Guardian Ad Litem shall be afforded the protection from disclosure provided by the attorney-client privilege.

3. The Guardian Ad Litem is a party to any judicial proceeding from the date of this order until the date of discharge and shall have all of the powers, privileges, and responsibilities authorized in Florida Statutes, to the extent necessary to advance the best interests of the Defendant. Among other purposes, the Guardian Ad Litem's role in this case is to ensure Defendant is communicating with defense counsel in a fully informed way and to facilitate the rendition of legal services to Defendant.

4. The Guardian Ad Litem must be provided with copies of all pleadings, notices, stipulations, and other documents filed in this action and is entitled to reasonable notice before

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any action affecting the Defendant is taken by either of the parties, their counsel, or the Court. The Guardian Ad Litem is entitled to be present at any depositions, hearings, or other proceedings concerning the Defendant.

5. The parties, or any other person entrusted by the parties with the care of the Defendant shall allow the Guardian Ad Litem access to the Defendant at reasonable times and locations and no person shall obstruct the Guardian Ad Litem from the Defendant.

6. The Guardian Ad Litem is automatically discharged without further order 30 days after the entry of a final order or judgment in this proceeding, unless otherwise ordered by the Court.

DONE AND ORDERED at Duval County Courthouse, Florida, this 21 day of December, 2011.

CIRCUIT COURT JUDGE

Copies:

Office of the State Attorney
Office of the Public Defender
Hugh Cotney, Esquire

CONSENT

THE UNDERSIGNED parties and attorney do hereby consent to the entry of this Consent Order Appointing Guardian Ad Litem, this 9th day of December, 2011.

MATT SHIRK, #0195911
Public Defender
407 North Laura Street
Jacksonville, Florida 32202
Attorney for Defendant

ANGELA COREY, #300942
State Attorney
220 East Bay Street
Jacksonville, Florida 32202
Attorney for State of Florida

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2011-6222

DIV.: CR-D

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CLERK CIRCUIT COURT

STATE OF FLORIDA

VS.

CRISTIAN FERNANDEZ

/

AMENDED MOTION TO APPOINT GUARDIAN AD LITEM

COMES NOW, DEFENDANT, CRISTIAN FERNANDEZ, by and through his undersigned counsel the Public Defender for the Fourth Judicial Circuit of Florida, and hereby moves this Honorable Court to appoint a guardian ad litem to serve as his parental and counselor to serve as a learned intermediary between Cristian and the attorneys representing him in this criminal prosecution. In support of this motion Cristian, by counsel, states:

1. Cristian is a twelve-year-old boy indicted as an adult on June 2, 2011 with one count of first-degree murder and one count of aggravated child abuse arising from the death of his two-year-old half brother David Galarraga.
2. Cristian has been in custody since March 15, 2011, in the Duval County Jail from March15, 2011 to June 3, 2011, and in the juvenile detention center since then.
3. Cristian's mother, Biannela Susana, was charged with aggravated manslaughter of a child, also arising from David Galarraga's death, and has been held in the Duval County Jail since April 2, 2011.

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4. [redacted]

5. [redacted]

6. [redacted]

7. This Court has broad discretion and inherent authority "to enter any order appropriate to a child's welfare." *B.Y. v. Dep't of Children and Families*, 887 So. 2d 1253, 1256 (Fla. 2004). The Court's inherent power includes the equitable power to appoint a guardian ad litem. *Peppard v. Peppard*, 198 So. 2d 67, 69 (Fla. 3rd DCA 1967).

8. Cristian is a 12 year old child charged as an adult with first degree murder who must be engaged with his defense counsel in intense pretrial proceedings and trial in the coming weeks, or alternatively involved in plea negotiations. He must not be required to continue in these unique circumstances to make grave decisions without a guardian ad litem to serve as parental advisor, next friend, and intermediary with his defense counsel.

9. Because the role of guardian ad litem for Cristian will be to ensure that he and his defense counsel communicate fully and with complete understanding as decisions are

made in this criminal proceeding or in plea negotiations, those communications shall be protected by the attorney-client privilege. See § 90.502(1)(c), F.S.; *Gerheiser v. Stephens*, 712 So.2d 1252, 1254-55 (Fla. 4th DCA 1998).

10. The undersigned has spoken with Attorney Hugh Cotney, who has agreed to the appointment as Cristian's guardian ad litem.

WHEREFORE, the undersigned attorney respectfully requests this Honorable Court enter an order appointing a guardian ad litem for Defendant, Cristian Fernandez, with attorney/client privilege afforded to communications therein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Amended Motion To Appoint Guardian Ad Litem has been hand delivered to the Office of The State Attorney, Jacksonville, Florida 32202, this 5th Day of December, 2011.

Respectfully submitted,

Matt Shirk, #0195911
Public Defender

FILED 12MAR15AM11:08 JIM FULLER

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2011-CF-6222

DIVISION: CR-D

STATE OF FLORIDA

v.

CRISTIAN FERNANDEZ
_____/

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS UNCONSTITUTIONAL INDICTMENT

COMES NOW Defendant, **CRISTIAN FERNANDEZ**, by and through his undersigned counsel, the Public Defender for the Fourth Judicial Circuit of Florida, and hereby files this Memorandum of Law to support his Motion to Dismiss Unconstitutional Indictment filed contemporaneously and hereby states as follows:

I. INTRODUCTION

The indictment of a juvenile, indeed in this case a pre-adolescent juvenile, and subsequent prosecution in adult court implicates many constitutional safeguards meant to protect the most vulnerable members of our society. Taken together, it becomes abundantly clear Defendant's constitutional rights have been violated by application of Florida's transfer-by-indictment statute and thus, the June 2, 2011 Indictment should be dismissed.

II. LEGAL ANALYSIS

A. Section 985.56(1) is unconstitutional on its face because it violates juveniles' rights to equal protection, due process and protection against cruel and unusual punishment.

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The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Article I, Section 2 of the Florida Constitution provides in pertinent part:

> **Basic rights.** – All natural persons, female and male alike, are equal before the law and have inalienable rights . . .

Article I, Section 9 of the Florida Constitution provides in pertinent part:

> **Due Process.** – No person shall be deprived of life, liberty or property without due process of law . . .

The Eighth Amendment to the United States Constitution (made applicable to the states through the Fourteenth Amendment) provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 985.56(1), Fla. Stat. provides in pertinent part:

> A child of any age who is charged with a violation of state law punishable by death or by life imprisonment is subject to the jurisdiction of the court as set forth in s. 985.0301(2) unless and until an indictment on the charge is returned by the grand jury. When such indictment is returned, the petition for delinquency, if any, must be dismissed and the child must be tried and handled in every respect as an adult . . .

The due process and equal protection clauses of the Federal and State Constitutions protect citizens from unfair governmental treatment, as does the Eighth Amendment ban against cruel and unusual punishment. The due process clause examines the fairness of an individual's treatment by the State, whereas the equal protection clause examines disparity in treatment between classes of individuals. *Evitts v. Lucey,* 469 U.S. 387 (1985). The due process clause requires an examination of the whole course of judicial proceedings to determine if "they offend

those canons of decency and fairness which express the notions of justice . . . even toward those charged with the most heinous offenses." *Malinski v. New York,* 324 U.S. 401, 416 (1945). "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' or are 'implicit in the concept of ordered liberty.'" *Rochin v. California,* 342 U.S. 165 (1952). Due process violations concern state conduct that "shocks the conscience." *Rochin* at 172.

In an equal protection analysis, on the other hand, the court must look at the type of classification involved, the individual interests impacted by the classification, and the governmental interests furthered by the classification. *Dunn v. Blumstein,* 405 U.S. 330 (1972). Unless the classification "trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage . . ." the court will review the classification to determine if it is "rationally related to a legitimate state purpose." *City of New Orleans v. Dukes,* 427 U.S.297 (1976).

Moreover, the Eighth Amendment ban against cruel and unusual punishment "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned to the offense,'" *Atkins v. Virgina,* 536 U.S. 304 (2002), quoting *Weems v. U.S.,* 217 U.S. 349, 54 L.Ed. 793 (1910). Indeed, by "protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper v. Simmons,* 543 U.S. 551 (2005). Admittedly, no punishment has been exacted in this case and, therefore, no Eighth Amendment violation has yet occurred. However, because life

imprisonment is mandated for first-degree murder convictions in Florida pursuant to § 782.04(1)(a) and § 775.082, Fla. Stat., the Eighth Amendment is implicated and, by following the case to its logical conclusion, a disproportionate and unconstitutional sentence would be mandated under Florida law if Defendant were convicted. To understand the linear constitutional impact of indicting a twelve-year-old child, then, a brief overview of Eighth Amendment jurisprudence is necessary.

The instant indictment statute violates constitutional protections at each stage of the process, from the prosecutorial decision to seek the indictment to the sentencing stage. The transfer-by-indictment statute, therefore, is unconstitutional because it violates the equal protection and due process clauses and mandates the imposition of cruel and unusual sentences. Therefore, because the indictment is unconstitutional and invalid, the June 2, 2011 Indictment should be dismissed.

1. **The statute allowing for the indictment of a child "of any age" violates the due process clauses of the United States and Florida Constitutions because such prosecution offends the notions of justice and "shocks the conscience."**

The Fourth District Court of Appeal addressed the due process issue as it pertains to the indictment of juveniles in *Brazill v. State,* 845 So. 2d 282 (Fla. 4th DCA 2003) and *Tate v. State,* 864 So. 2d 44 (Fla. 4th DCA 2003). However, since the time of these two cases, the Supreme Court has decided *Roper, supra; Graham v. Florida,* 130 S. Ct. 2011 (2010), and *J.D.B v. North Carolina,* 564 U.S. _____ (2011), recognizing that children are fundamentally different from adults and such differences should be taken into consideration in a constitutional analysis. In light of such recognition by the Supreme Court, the substantive due process issue must be re-

examined because the prosecution of such very young children in our society as adults "shocks the conscience." *Rochin, supra; Crowe v. County of San Diego,* 593 F. 2d 841 (9th Cir., 2010).

In both *Brazill* and *Tate,* the juveniles (Lionel Tate was 12 at the time of the crime; Nathaniel Brazill was 13) were indicted pursuant to what was then § 985.255, Fla. Stat., now renumbered as § 985.56. The *Brazill* court reasoned that such indictment procedures did not implicate a "fundamental constitutional right" and therefore such a substantive due process challenge was subject to the rational-basis standard of review, citing *Shapiro v. State,* 696 So. 2d 1321 (Fla. 4th DCA 1997).[1] The court found the indictment statute did not violate substantive due process because it was "related to the state's interest in crime deterrence and public safety." It surmised, "It is not unreasonable for the legislature to treat children who commit serious crimes as adults in order to protect societal goals." It then pointed out the rise in juvenile crime and the recidivism rate that was prevalent at the time and determined it was within the purview of the legislature to determine society was deserving of greater protection from dangerous juveniles than the juvenile system provided.

The *Tate* court seven months later summarily denied a multitude of constitutional arguments, referring to *Brazill.* The court noted juvenile sanctions were a matter of legislative creation and the Constitution did not grant juveniles a special system as a matter of right. *Id.* at 54. Florida appellate courts have not addressed this issue since the recent Supreme Court holdings in *Roper, Graham, and J.D.B.* However, the recent High Court acceptance of brain

[1] However, it could be argued that, in light of *Graham,* a juvenile does, in fact, have a fundamental right to rehabilitation.

development research compels a more thorough examination of the constitutional impact of the prosecution of youth in adult court.

In fact, the High Court in *Graham* acknowledged the necessity to address this very same transfer statute

> under Florida law a child of any age can be prosecuted as an adult for certain crimes and can be sentenced to life without parole. The State acknowledged at oral argument that even a 5-year-old, theoretically, could receive such a sentence under the letter of the law. . . all would concede this to be unrealistic, but the example underscores that the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration. *Graham* at 2026.

The instant case certainly calls out for judicial examination of the transfer-by-indictment statute. Its likely unintended application to younger and younger children, affording nearly unbridled prosecutorial discretion to seek the indictment, and its lack of constitutional safeguards in light of recent acceptance of brain science research, underscores the necessity to take a good, hard look at this statute and its constitutional implications. Such inspection requires an understanding of how youth has figured into legislative, constitutional, scientific and societal analysis and how that impacts the criminal justice system.

a. The legislature has granted deference to youth by enacting numerous statutes and policies because it recognizes the vulnerability, irresponsibility, and impulsivity of adolescence (and in this case pre-adolescence).

Florida statutes are replete with examples of legislative protections of and deference to youth. Legislators have seen fit to protect youth and to limit their liberties in a multitude of ways. Youth are restricted from driving in all circumstances before the age of 15 and with

restrictions until the age of 18;[2] they cannot marry before the age of 18 without parental consent and cannot marry at all if they are under 16;[3] they are not allowed to gamble until 18 but cannot play the slot machines or gamble in casinos until 21;[4] they cannot smoke or use or purchase tobacco products before the age of 18;[5] they cannot consent to sexual activity before the age of 16 and cannot consent to have sex with anyone over the age of 23 until the age of 18;[6] they cannot purchase fireworks before the age of 18;[7] nor can anyone under the age of 16 get a tattoo and a minor can only be tattooed at 16 with parental consent.[8] Children under the age of 14 are prohibited from working, children 14 and 15 years old can only work during non-school hours and for no more than 15 hours per week, and children 16 and 17 can only work up to 30 hours per week.[9] Children under the age of 18 generally cannot enter into contracts (with the exception that children 16 and over can contract for student loans[10]), and can only sue if a "next friend" or guardian is appointed.[11]

It is inconsistent and illogical to contend that adolescents and pre-adolescents are incapable of making the decision to put ink into their bodies but are capable of comprehending their constitutional rights in adversarial adult criminal proceedings and making sound judgments therein that will impact the remainder of their lives. Indicting and prosecuting children "of any age" runs counter to the concept of protecting vulnerable youth when viewed from the larger

[2] § 322.165 and § 322.16, Fla. Stat. (2011).
[3] § 741.0405, Fla. Stat. (2011).
[4] §849.086, Fla. Stat. (2011).
[5] § 569.101, Fla. Stat. (2011).
[6] § 794.05, Fla. Stat. (2011).
[7] Ch. 791, Fla. Stat. (2011).
[8] § 381.00787, Fla. Stat. (2011).
[9] Ch. 450, Fla. Stat. (2011).
[10] § 743.05, fla. Stat. (2011).
[11] Fla. R. Civ. P. 1.210(b).

societal context. Certainly, prosecuting such young children in adult court when viewed in this way offends the notions of justices and "shocks the conscience."

b. Children "of any age" do not have the capacity to understand complicated legal proceedings and the grave impact on their constitutional rights.

As outlined above, government has found it fit to protect children from others and from themselves in myriad ways. It is then inconsistent to find a child who does not have the capacity to enter into contracts, get tattoos or work outside the home could then have the capacity to understand complex constitutional rights which impact the case and their futures. Young adolescents and pre-adolescents are at relatively high risk of wrongful prosecution and sentencing because they are "less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes," *Atkins, supra* at 320. Obviously, the younger the defendant, the greater the danger of wrongful prosecution and unfair sentencing. Pre-adolescent and younger adolescent children are even less able to make informed choices because of their lack of life experience and knowledge, their inability to think of alternatives and possible consequences and their lack of self-confidence in decision-making and deference to authority figures.[12] The indictment statute allowing for transfer of children "of any age" "shocks the conscience" when considering accepted brain science and a child's capacity to understand the legal system and constitutional rights.

c. Comparing Florida's criminal prosecution of juveniles with other states reveals a lack of constitutional safeguards included in other state criminal procedure rules and statutes.

[12] Adolescent Decision Making, 12 J. Adolescence 265, 267-70 (1989).

An examination of the criminal prosecution of juveniles charged with first-degree murder in other states shows a consideration of the vulnerabilities of youth – a consideration not present in the Florida statutory scheme. This failure to consider age in any stage of the process is a fundamental flaw in the Florida system and denies juveniles substantive due process.

Age is incorporated as a consideration in the prosecution of serious crimes at some stage in every state but Florida. Most states set a minimum age to prosecute children as adults, most typically the age of 14.[13] In fact, in 29 states and the District of Columbia, a twelve-year-old child could not be prosecuted as an adult.[14] Of the 21 states that allow for such prosecution, Florida stands alone in the nation in having no judicial review of the prosecutor's or grand jury's

[13] Alaska Code sec. 15-19-1 (2011); Ariz. Rev. Stat. Ann sec. 13-501(2011);Ark Code Ann. Sec 9-27-318 (2010); Cal. Welf. & Inst. Sec. 602 (2011); Colo. Rev. Stat. Ann sec 19-2-517(2011); Conn Gen. Stat. Ann sec 46b-127(2011); D.C. Code sec. 16-2301, sec. 16-2307(2011); Ga. Code Ann sec. 15-11-28, 15-11-30.2, 17-7-50.1 (2011); 705 Ill. Comp. Stat. Ann sec. 405/5-130, 705 Ill. Comp. Stat. Ann. Sec.405/5-805 (2011); Ind. Code Ann. Sec. 31-30-3-4 (2011); Iowa Code Ann. Sec. 232.8, 232.45 (2011); Kan. Stat. Ann. Sec. 38-2347 (2010); Ky. Rev. Sat. Ann sec. 635.020, 640.030, 532.060 (2011); La. Child Code Ann. Art. 305 (2010); Md. Code Ann., Cts. & Jud. Proc. Sec. 3-8A-03, Md. Code Ann., rim. Proc. Sec. 4-202 (2011); Mass. Gen. Laws Ann. Ch. 119 sec. 74, 72B (2011); Mich. Comp. Laws, Ann. Sec. 712A. 2d, 712A.4 (2011); Minn. Stat. Ann sec. 260B.103, 260B.125 (2011);Miss. Cod Ann. Sec. 43-21-151 (2010); Nev. Rev. Stat. Ann. Sec 62B.390 (2010); N.J. Stat. Ann. Sec 2A:4A-26 (2011); N.M. Stat. Ann sec. 32A-2-3, 32A-2-20 (2011); N.Y. Fam. Ct. Act sec. 301.2, N.Y. Penal sec. 125.27 (2011); N.C. Gen. Stat. sec. 14-17 (2011); N.D. Cent. Code sec. 27-20-34 (2009); Ohio Rev. Code Ann. Sec. 2152.10, 2152.12 (2011); Or. Rev. Stat. sec. 137.707 (2011); Tex. Fam. Code Ann. Sec. 54.02 (2011); Utah Code Ann. Sec. 78A-6-701 (2011); Va. Code Ann. Sec. 16.1-269.1 (2011); Wis. Stat. Ann. Sec. 938.183 (2011); Wyo. Stat. Ann. Sec. 14-6-203, 14-6-237 (2011).

[14] Alaska Stat. Ann § 47-12-030 (2010); Ariz. Rev. Stat. Ann § 13-501 (2011); Ark. Code Ann § 9-27-318 (2010); Colo. Rev. Stat. Ann § 19-2-517 (2011); Conn. Gen. Stat. Ann. § 46b-127 (2011); D.C. Code §§ 16-2301, 16-2307 (2011); Ga. Code Ann. §§ 15-11-28, 15-11-30.2, 17-7-50.1 (2011); Idaho Code §§ 20-508, 20-509 (2011); 705 Ill. Comp. Stat. Ann § 405/5-130, 705 Ill. Comp. Stat. Ann. § 405/5-805 (2011); Iowa Code Ann. §§ 232.8, 232.45 (2011); Kan. Stat. Ann. § 38-2347 (2010); Ky. Rev. Stat. Ann. §§ 635.020, 640.010 (2011); La. Child Code Ann. Art. 305 (2010); Md. Code Ann., Cts. & Jud. Proc. § 3-8A-03; Mass. Gen. Laws Ann. Ch.119 §§ 74, 72B (2011); Mich. Comp. Laws Ann. §§ 712A.2d, 712A.4 (2011); Minn. Stat. Ann. §§ 260B.103, 260B.125 (2011); Miss. Code Ann. § 43-21-151 (2010); Nev. Rev. Stat. Ann. § 62B.390 (2010); N.J. Stat. Ann. § 2A:4A-26 (2011); N.M. Stat. Ann. §§ 31-20A-2, 31-18-13, 31-18-15.2 (2011); N.Y. Fam. Ct. Act § 301.2; N.C. Gen. Stat. §§ 7B-2200; N.D. Cen. Code § 27-20-34 (2009); Ohio Rev. Code Ann. §§ 2152.10,2152.12 (2011); Or. Rev. Stat. § 137.707 (2011); Tex. Fam. Code Ann. § 54.02 (2011); Utah Code Ann. § 78A-6-701 (2011); Va. Code Ann. § 16.1-269.1 (2011); Wyo. Stat. Ann. §§ 14-6-203, 14-6-237 (2011).

decision to charge in adult court. These states allow for judicial review, either pursuant to a waiver hearing in juvenile court, a reverse-waiver hearing in adult criminal court or by appeal, to determine which court best serves the interests of justice in that particular case.[15] Some states allow for judicial discretion in determining an appropriate sentence for young offenders and do not include mandatory life without parole sentences.[16]

Likewise, among the minority of states that have no minimum age to indict on first-degree murder charges, only Florida fails to incorporate safeguards to protect the substantive due process rights of these young defendants.[17] Age is still considered as a factor at some point in these other states, either through the above-mentioned waiver and reverse waiver hearings, appeal, or in sentencing. For example, Pennsylvania (which is most like Florida in that no minimum age is set for indicting on first-degree murder charges and includes mandatory life without parole sentencing) includes a reverse-waiver system, allowing transfer back to juvenile court if such transfer serves "the public interest" and allows the judge to consider age in such

[15] Ala. Code § 15-19-1 (2011); Ark. Code Ann. § 9-27-318 (2010); Del. Code Ann. Title 10, § 1010 (2011); Haw. Rev. Stat. §571-22 (2011); Iowa Code Ann §§ 232.8, 232.45 (2011); Me. Rev. Stat. Ann. Title 15 §3103 92011); Md. Code Ann. Cts. & Jud. Proc. § 3-8A-03; Mich. Comp. Laws Ann §§ 712A. 2d, 712A.4 (2011); Mo. Stat. Ann. § 211.071 (2011); Neb. Rev. Stat. §§ 29-1816, 43-247, 43-276 (2010); Nev. Rev. Stat. Ann § 62B.390 (2010); N.H. Rev. Stat. Ann § 169-B:24 (2011);Ohio rev. Code Ann §§2152.10, 2152.12 (2011); Okla. Stat. Ann. Title 10A § 2-2-403 (2011); 42 Pa. Cons. Stat. Ann.§§ 6322, 6355 (2011); R.I. Gen. Laws Ann. § 14-1-7 (2010); S.C. Code Ann. § 63-19-1210(2010); S.D. Codified Laws §§ 26-11-3.1, 26-11-4 (2011); Tenn. Code Ann. § 37-1-134 (2011); Vt. Stat. Ann. Title 33, §§ 5102, 5204 (2011); Wash. Rev. Code Ann. §13.40.110 (2011).

[16] Ala. Code § 15-19-1 (2011); D.C. Code §§ 22-2104.01, 22-2104 (2011); § 985.56, Fla. Stat. (2011); Idaho Code § 18-4004 (2011); 730 Ill. Stat. Comp. Ann § 5/5-4.5-20 (2011); Ky. Rev. Stat. Ann §§635.020, 640.030, 532.060 (2011); Me. Rev. Stat. Ann. Title 15 § 1251 (2011); Mon. Code Ann. §§ 46-18-222, 45-5-102 (2011); Nev. Rev. Stat. Ann § 200.030 (2010); N.M. Stat. Ann § § 31-20A-2, 31-18-13, 31-18-15.2 (2011); N.Y. Penal § 70.00 (2011); N.D. Gen. Stat. § 12.1-32-01 (2009);Okla. Stat. Ann. Tit.e 21 § 701.10 (2011); Or. Rev. Stat. §§ 163.105, 163.115, 137.707 (2011); Tenn. Code Ann. §§39-13-202, 37-1-134 (2011); Vt. Stat. Ann. Title. 13, § 2303 (20111); W. Va. Code Ann. §61-2-2 (2011); Wis. Stat. Ann. §§ 939.50, 940.01, 973.014 (2011); Wyo. Stat. Ann. §6-2-101 (2011).

[17] See Del. Code Ann. Title 10 § 1010 (2011).

cases.[18] Certainly, this procedural safeguard allows a court to examine the unique factors in each case and determine where justice would best be served. The unfettered and unchecked prosecutorial discretion in the Florida system, however, impedes true justice in cases dealing with young defendants. The inability to consider a child's tender years, either in determining forum or sentencing, creates situations that "shock the conscience." Such a conscience-shocking situation, in fact, occurred in this case—a case in which a twelve-year-old boy faces a life sentence without the opportunity for parole if convicted. Certainly, consideration of a child's age at some stage of the proceedings would ensure substantive due process rights were protected. No such safeguards, however, exist under Florida law. This fundamental flaw in the Florida system violates substantive due process and is, therefore, unconstitutional.

d. The mandatory sentence of life without the possibility of parole for a first-degree murder conviction of a juvenile underscores the unforeseen consequences of indicting children "of any age" as adults.

First-degree murder is a capital offense in Florida and is punishable either by death by execution or life imprisonment without the possibility of parole. § 782.04(1)(b). Since the Supreme Court has decided in *Roper* that the death penalty is an Eighth Amendment violation as applied to juveniles, and *Graham* does not apply to homicide cases (and since parole was abolished in all cases by 1995), a child prosecuted pursuant to the transfer-by-indictment statute for first-degree murder faces a mandatory life imprisonment sentence. This confluence of the abolishment of parole and the legislative loosening of juvenile direct filing requirements (as well as other "tough on crime" initiatives), begs the question, "Did the legislature contemplate that

[18] 42 Pa. Cons. Stat. Ann. §§ 6322, 6355 (2011).

children indicted for capital and life felonies would face life imprisonment?" The legislative history of these two statutes does not indicate such contemplation. As the *Graham* court remarked, it does not appear such an outcome was endorsed by "deliberate, express, and full legislative consideration," *Graham, supra* at 2026. The transfer-by-indictment statute's likely unintended outcome of tying the hands of judges from considering the child's age and maturity in sentencing such cases underscores the likelihood such was a "legislative accident." If the legislature had, in fact, contemplated a five-year-old serving a life without parole sentence, such legislation would certainly "shock the conscience." Legislative hand-tying of judicial discretion in such difficult cases could only be the result of a lack of "deliberate, express and full legislative judicial consideration" and, therefore, does not pass constitutional muster.

2. The statute allowing for the indictment of a child "of any age" violates the equal protection clauses of the United States and Florida Constitutions because it allows different treatment of similarly situated juveniles.

Implicit in the above indictment statute is the creation of two classifications as it pertains to juveniles. The first pertains to the classification of those children subjected to the grand jury indictment process pursuant to prosecutorial discretion and those who remain in juvenile court based on that same discretion. The second classification pertains to the treatment of those juveniles who are alleged to have committed crimes punishable by death or life imprisonment and those children alleged to have committed other crimes. Such classifications would be subject to review under the "rational basis" test. *See City of New Orleans, supra.*

The first classification creates a class of juveniles for which prosecutors have elected to seek indictments of children "of any age" and a class of those juveniles similarly situated but (for

whatever reason) the prosecutors have elected to adjudicate in juvenile courts. The injection of prosecutorial discretion in the decision to seek an indictment or to keep the proceedings in juvenile court allows for different treatment of similarly situated juveniles. The statute provides no parameters to guide the prosecutor's decision on whether to seek an indictment and introduces a certain amount of arbitrariness into the process. A child living in one part of the state under the auspices of a particularly vigilant state attorney may be prosecuted in adult court, whereas another child under a state attorney with a more rehabilitative outlook may remain in the juvenile system. This very disparity compromises the child's equal protection of the laws. *See State v. Mohi,* 901 P. 2d 991 1003 (Utah 1995)("Choosing which court to file charges in has significant consequences for the offender, and the statute does not indicate what characteristics of the offender mandate that choice. The scope for prosecutor stereotypes, prejudices, and biases of all kinds is simply too great.") Allowing the prosecutor discretion to consider or refuse to consider the juvenile's age and maturity unfairly prejudices some juveniles and, thus, is an improper classification.

The second classification created by this juvenile transfer statute is the differentiation between similarly situated youth who commit crimes punishable by death or by life imprisonment and those who do not. This distinction ignores the fact that youth under the age of 18 are not eligible to receive the death penalty, nor are they eligible to receive a sentence of life imprisonment without parole in nonhomicide cases. *Roper* and *Graham, supra.* Although the classification obviously is constructed to address the most serious of crimes, recent Supreme Court inspection of scientific research mitigates juvenile culpability to some extent. Such

acknowledgement by the Court that juveniles think differently than adults and may be thus less culpable dilutes the potency of this bright line distinction for the most serious offenses. In other words, the distinction fails to consider the scientific research accepted by the *Graham* court that should impact the manner in which juveniles are treated during all stages of the justice system.

Although the juvenile transfer-by-indictment statute has survived constitutional scrutiny in the past, *Roper* and *Graham* mandate a re-examination based on the High Court's acceptance of this scientific research and evolving standards of decency. *See Johnson v. State,* 314 So. 2d 573 (Fla. 1975); *State v. Cain,* 381 So. 2d 1361 (Fla. 1980). In fact, in *Brazill, supra,* the Fourth DCA, in deflecting constitutional challenge of the indictment of a thirteen year old, reasoned the disparate treatment of children thirteen years of age and younger did not violate equal protection because of the "broad discretion accorded a prosecutor under our legal system." *Id.* at 289. However, since the time of the *Brazill* decision, the United States Supreme Court has recognized in *Graham* that prosecutorial discretion is limited, that juveniles as a category are fundamentally and inherently different from adults, and that those differences must be taken into account when considering the constitutional impact of criminal laws and procedures. *Graham* and *Roper* simply change the jurisprudential lens with which we must view the constitutionality of laws relating to juveniles. *See also J.D.B., supra,* (age of juvenile subjected to police questioning relevant to *Miranda* custody analysis, citing *Eddings v. Oklahoma,* 455 U.S. 104, 115, (1982) "'our history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults. . . Children 'generally are less mature and responsible than adults . . . They

often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.'").

Thus, *Graham, Roper,* and *J.D.B* invoke a more thoughtful jurisprudential analysis when applied to the "reasonable relation to a proper legislative purpose" standard cited in *McKenzie, supra.* Now, it is incumbent upon the Courts to decide the legislative purpose of prosecuting children who allegedly commit serious crimes—is it deterrence, retribution, rehabilitation or a combination thereof? Certainly, none of those possible purposes are best served, or even reasonably served, by prosecuting children "of any age" as adults. Studies show juvenile transfer laws have little to no deterrent effect on juvenile crime.[19] The research indicates in order for transfer to adult court to have significant deterrent effect on juveniles, they would need to know, understand, and appreciate the crimes committed as well as the potential consequences of committing that crime. *Id.* The *Graham* court recognized that "parts of the brain involved in behavior control continue to mature through late adolescence." *Graham* at 2026, 2027. Children "of any age" do not have the neurological capacity to know, understand and appreciate crime and its consequences and thus, prosecuting children does not deter other children from committing criminal acts.

Moreover, retribution or punishment of children by prosecuting in adult court is not logical in consideration of this diminished capacity to know, understand, and appreciate the crime allegedly committed and its consequences. Because juveniles often do not completely understand the reason for their punishment, the punishment is so harsh, so detrimental, so

[19]U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Transfer Laws: An Effective Deterrent to Delinquency?, Juvenile Justice Bulletin, June 2010.

disproportionate to be anathema in a civilized society. In fact, the negative ramifications of adult sanctions for juvenile offenders are staggering: juveniles often suffer severe physical, mental and sexual injury and juveniles housed in adult facilities have been found to be eight times more likely to commit suicide than those juveniles housed in juvenile facilities.[20] Juveniles are also more likely to be victimized by other inmates than are adult prisoners and are also twice as likely to be victimized by prison staff. *Id.* at 131. "Punishing" in such a way does not bear a reasonable relation to a proper legislative purpose.

Studies further indicate rehabilitative goals are best served when a child receives juvenile sanctions, rather than adult sanctions. The *Graham* court noted juveniles are "more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults will be reformed." Indeed, the ultimate goal of juvenile justice is to rehabilitate offenders and make them productive members of society.[21] Children adjudicated delinquent in the juvenile justice system have a "right to treatment" pursuant to the doctrine of parens patriae, while those children prosecuted as adults are in custody under the state's police power and do not have a right to rehabilitative treatment. *Kent v. United States,* 383 U.S. 541 at 555 (1966).[22] Children in juvenile facilities receive educational and therapeutic services, while those in adult facilities often do not.[23] Therefore, if such purpose were tied to rehabilitation, adult sanctions do not bear a reasonable relationship toward such purpose.

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[20] James Austin, Kelly Johnston and Maria Gregorious, U.S. Department of Justice, Office of Justice Programs, Juveniles in Adult Prison and Jails, A National Assessment, October 2000 at 8, as cited in 27 J.Juv.L. *supra* at 130.
[21] *See* § 985.01, Fla. Stat. (2011) et. seq.
[22] 71 La. L. Rev. 99, Fall 2010.
[23] *Physicians for Human Rights: The Criminalization of a Mental Health Problem,* www.phrusa.org/campaigns/juv justice/mental.html; 27 J. Juv. L. at 130.

Classifying children "of any age" that allegedly commit crimes punishable by death or life imprisonment to be treated differently from other juveniles in the criminal justice system violates the equal protection clause because the classification does not bear a reasonable relation to a legitimate state purpose. In fact, considering the evidence available pertaining to juvenile psychology and behavior, adult sanctions run counter to the state purposes of rehabilitation, retribution and deterrence. Thus, the classification within the statute violates the equal protection clause and does not pass constitutional muster.

3. The statute allowing for the indictment of a child "of any age" implicates the Eighth Amendment ban against cruel and unusual punishment because Florida statutes mandate life imprisonment for juveniles convicted of first-degree murder.

Although no punishment has been assigned in this case, and technically no Eighth Amendment violation has yet occurred, it must be understood that following the process from indictment through sentencing, the transfer-by-indictment statute implicates Eighth Amendment concerns. Because the only sentence available to a child convicted of first-degree murder is life imprisonment without the possibility of parole, it is imperative to examine the forum in which such charges are brought. Following the transfer-by-indictment statute to its natural conclusion, Eighth Amendment constitutional issues arise.

Recently, a flurry of Supreme Court activity in this area of Eighth Amendment jurisprudence has underscored the High Court's concerns of the treatment of juveniles by the court system. The Court has acknowledged that youth are different from adults and therefore less culpable and more deserving of leniency. *See Roper, supra,* (holding the death penalty as applied to juveniles is unconstitutional); *Graham, supra,*(holding life without parole sentences

for non-homicide crimes is unconstitutional as applied to juveniles). In fact, the *Graham* court noted, "An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendant's youthfulness into account at all would be flawed." *Graham, supra* at 2031.

Further, in November of this year, the Supreme Court agreed to review two cases this term which question the constitutionality of imposing life without parole sentences to juveniles fourteen years of age and younger convicted of murder. *Miller v. Alabama,* (USSC docket 10-9646) and *Jackson v. Hobbs* (USSC docket 10-9647). [24] Oral argument on both of these cases has been set for March 20, 2012 and a decision is expected sometime in 2012. These recent decisions and acceptance of review of these cases underscore the Court's acceptance that children are simply different from adults and the imposition of their sentences must take this into account.

The *Miller* and *Jackson* cases pose significant Eighth Amendment questions which would have a direct bearing on this case if Defendant were convicted as charged in the June 2, 2011 Indictment. The *Miller* case poses two issues for Supreme Court review. The first issue concerns whether sentencing a child fourteen and under to life imprisonment with no possibility of parole categorically violates the Eighth Amendment prohibition against cruel and unusual punishment. The second issue posed by *Miller* concerns whether *mandatory* life without parole sentences which leave no discretion to the judge to consider age and other mitigating evidence violates the Eighth Amendment prohibition against cruel and unusual punishment. The *Jackson*

[24] All cases filings made in these cases, including the Petitions for Writs of Certiorari, can be accessed at http://www.scotusblog.com/miller-v-alabama and http://www.scotusblog.com/jackson-v-hobbs/.

case incorporates these issues but also poses the issue of whether a life without parole sentence can be imposed when the murder conviction was based solely on accessorial-liability and felony-murder principles. The Supreme Court's holdings and analysis on all of these significant issues directly impact Defendant's case because Defendant faces a mandatory life without parole sentence if convicted (with no consideration of age allowed) and because the State is prosecuting under a felony-murder theory. If the High Court finds that children 14 and younger cannot be sentenced to life without the possibility of parole for any offense, § 985.56 would be null and void. This statute only authorizes transfer of juvenile cases to adult court for such children for "a violation of state law punishable by death or life imprisonment" and because neither sentence would be an option in cases of these young children, Florida law would not permit indictment of such young children.

Similarly, the mandatory sentencing structure that exists in Florida law that does not permit judges to take age into consideration in sentencing pursuant to first-degree murder convictions will likely not pass constitutional muster. The non-tenability of such a sentence in the instant case, which derives from the transfer-by-indictment statute, requires a dismissal of the June 2, 2011 Indictment. Therefore, the Supreme Court's decision on both the *Miller* and *Jackson* cases will directly impact the validity of prosecuting Defendant as an adult.

B. Section 985.56(1) is unconstitutional as applied to Defendant because it violates his constitutional rights to equal protection, due process and protection against cruel and unusual punishment.

As outlined above, Florida's transfer-by-indictment statute is unconstitutional on its face for a number of reasons. Moreover, the transfer-by-indictment statute as applied to Defendant

exposes the significant constitutional infringements that occurred in this case—the case of a twelve-year-old boy.

The trammeling of Defendant's equal protection rights is evident from a review of the procedural history of this case. The state attorney's unilateral decision to seek an indictment of Defendant does not serve a *legitimate* state interest in this particular case and does not further the state interest in "crime deterrence and public safety" as outlined by the *Brazill* court.

In fact, evidence shows that the prosecution of Defendant as an adult does not further the State goals of crime deterrence, retribution or rehabilitation. Rather, given the nature of the allegations against Defendant, it would be difficult to demonstrate this case would have any impact on the way children behave or deter crime whatsoever. Similarly, the punishment of life without parole is so disproportionate to Defendant's alleged culpability in this case to be anathema in a civilized society and does not serve retribution goals. How can a mandatory life without parole sentence (the only sentence available if this child is convicted at trial) be fair punishment of a twelve-year-old child? Also, the indictment of Defendant does not serve the State's interest in rehabilitation because the child's best chances for rehabilitation exist in the juvenile system—a system geared to that end, which includes counseling and treatment. Therefore, the classifications created by the transfer-by-indictment statute violate Defendant's equal protection rights and the June 2, 2011 indictment should be dismissed.

Indeed, the transfer-by-indictment statute as applied to Defendant shocks the conscience and offends the notions of justice, thereby violating his substantive due process rights. Further, the possible outcome of such transfer, life imprisonment without parole, shocks the conscience

as well. The prospect of Defendant, a twelve-year-old boy, serving a mandatory life sentence in this case is unthinkable. The risk of possible life imprisonment must be factored into the defense of this child and underscores the disjointedness in the process and the brokenness of a system that allows for the indictment and prosecution of a young child for an offense mandating life imprisonment. As such, as applied to the particulars of Defendant's case, the transfer-by-indictment statute is unconstitutional, and the indictment should, therefore, be dismissed.

III. CONCLUSION

The indictment of a twelve-year-old child for first-degree murder raises many constitutional "red flags" which require thoughtful analysis. Such examination reveals application of the transfer-by-indictment statute, § 985.56(1), Fla. Stat. (2011), violated Defendant's constitutional rights to equal protection, due process and protection against cruel and unusual punishment. Therefore, Defendant requests the June 2, 2011 Indictment be dismissed. Should this Honorable Court deny this Motion to Dismiss Unconstitutional Indictment, the undersigned requests leave to move to dismiss the June 2, 2011 Indictment at a later date.

I HEREBY CERTIFY that a copy of the above and forgoing Memorandum of Law in Support of Motion to Dismiss Unconstitutional Indictment has been furnished to the Office of the State Attorney, by hand, this 30th day of January, 2012.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: [signature] 0844349
FOR **MATT SHIRK, #0195911**
Public Defender

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NOS.: 16-2011-CF-6222
16-2012-CF-136
DIVISION: CR-D

STATE OF FLORIDA

v.

CRISTIAN FERNANDEZ,

_____/

FILED
IN COMPUTER
A. J.

ORDER OF SUBSTITUTION OF COUNSEL

THIS CAUSE, having come before the Court on the Motion for Substitution of Counsel [redacted] and the Court being advised in the premises, it is hereby **ORDERED AND ADJUDGED** that:

1. The law firms of Holland & Knight LLP, Bedell, Dittmar, DeVault, Pillans & Coxe, P.A., McGuire Woods LLP, Creed & Gowdy P.A., and Law Office of D. Gray Thomas, P.A., are substituted as attorneys of record for the Public Defender in and for the Fourth Judicial Circuit of Florida;

2. All motions, pleadings, reports, correspondence and other communications, whether filed by the Court or any other party of interest, shall henceforth be directed and forwarded to the above-referenced substituted counsel.

DONE AND ORDERED in Chambers, in Duval County, Florida, on this 9 day of February, 2012. Nunc Pro Tunc

MALLORY COOPER
CIRCUIT COURT JUDGE

Copies furnished to:
Public Defender in and for the Fourth Judicial Circuit of Florida
State Attorney in and for the Fourth Judicial Circuit of Florida
#10929319_v1

EXHIBIT
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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NOS.: 16-2011-CF-6222
16-2012-CF-136
DIVISION: CR-D

STATE OF FLORIDA

v.

CRISTIAN FERNANDEZ,

Defendant.
_____/

MOTION TO PROHIBIT THE PUBLIC DEFENDER FROM MAKING EXTRA-JUDICIAL STATEMENTS ABOUT PENDING PROCEEDINGS

Cristian Fernandez, through undersigned counsel and pursuant to Rule 4-3.6(a) of the Florida Rules of Professional Conduct, requests that the Court enter an Order prohibiting the public defender from making certain extrajudicial statements to the media or other third-parties about the above-referenced legal proceedings, and states:

1. In June of 2011, both the State and the public defender sought imposition of a protective order prohibiting the parties from making certain extra-judicial statements to the media and to the public, recognizing that statements about Cristian Fernandez and about these legal proceedings could materially prejudice a future trial. The Court agreed, and entered an Amended Protective Order on August 4, 2011 precluding extra-judicial statements that were "substantially likely to materially prejudice" these proceedings. The Court ordered all parties to comply with Rule 4-3.6(a) of the Florida Rules of Professional Conduct, which provides:

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

EXHIBIT
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2. Even after substitution of counsel, prior defense counsel has a continuing obligation to comply with the Rules of Professional Conduct and with this Court's Amended Protective Order. Those obligations include avoiding making statements that have a substantial likelihood of prejudicing the legal proceedings, and continuing to safeguard and hold confidential information and work-product developed during the prior representation.

3. As recently as February 7, 2012, and without consulting undersigned counsel, the public defender made statements to the media disclosing information obtained exclusively during the attorney-client relationship with Cristian Fernandez, including personal impressions about Cristian and the ongoing legal proceedings. (See Exhibit "A", WOKV News Report dated February 7, 2012). There is a substantial likelihood that these and other similar statements may materially prejudice Cristian's ability to receive a fair and impartial trial in Duval County.

4. The "substantial likelihood of material prejudice standard" espoused in Rule 4-3.6(a), and adopted by this Court in its Amended Protective Order, "constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and in the State's interest in fair trials." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991); see also The Florida Bar re: Amendments to Rules Regulating the Florida Bar, 644 So.2d 282, 283 (Fla. 1994) (incorporating Gentile standard into Rule 4-3.6 of the Florida Rules of Professional Conduct). The public defender has an ethical and legal obligation to refrain from making any additional statements to the media or to the public about personal impressions obtained during the representation, as well as any other extra-judicial statements that may prejudice Cristian's fundamental right to a fair and impartial trial.

WHEREFORE, Cristian Fernandez, through undersigned counsel, hereby requests that the Court enter an Order prohibiting the public defender from making any extra-judicial

statements about these legal proceedings that in any way disclose information or impressions developed during the representation, or which are otherwise substantially likely to materially prejudice a fair trial.

Dated: February 9, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Motion to Prohibit Prior Defense Counsel From Making Extra-Judicial Statements About Pending Proceedings has been furnished, by hand, to the **Office of the State Attorney in and for the Fourth Judicial Circuit of Florida,** 220 East Bay Street, Jacksonville, Florida 32202, and the **Office of the Public Defender in and for the Fourth Judicial Circuit of Florida,** 407 N. Laura Street, Jacksonville, Florida 32202, **this 9th day of February, 2012.**

George E. Schulz, Jr., Esq.

#10952619_v2

Exhibit "A"

Posted: 11:23 a.m. Tuesday, Feb. 7, 2012

Public Defender speaks on Fernandez case

Kevin Rincon

By Matt Augustine

JACKSONVILLE, Fla. — We're learning new details about a side of Florida's youngest murder suspect.

"He's really a remarkable little boy...knowing what he's been through his entire life, it's amazing to see how smart he is, how jovial he can be at times," said public defender Matt Shirk

That's how public defender Matt Shirk portrayed 13-year-old Cristian Fernandez when I sat down to talk candidly with Shirk about Cristian, and after spending months on the case working with Cristian, Shirk would know. The public defender's office stepped down from the case last week in lieu of a new defense counsel made up of six high-profile attorneys from 5 different private law firms from around Jacksonville.

"Of all the kids that are in custody over at the detention center, the staff there have Cristian up on a pedestal. They think he's the best kid they've had there in any recent memory."

Shirk says he's glad to be done with the case from an administrative standpoint, because now taxpayers won't be footing the bill for Cristian's defense, but says he and his office will be there to assist if his office is needed.

Schulz, Buddy (JAX - X25462)

From: Matt Shirk [mas@pd4.coj.net]
Sent: Thursday, February 09, 2012 4:09 PM
To: Henry Coxe
Cc: D. Gray Thomas; Schulz, Buddy (JAX - X25462)
Subject: Re: our conversation yesterday

Here is what you can count on from me. I will not agree to have "no comment" as it relates to this case. I do, however, agree that I will fully comply with Rules 4-1.6 and 4-1.9 regulating the Florida Bar. 4-1.6 relates to confidentiality and 4-1.9 relates to conflicts of interest and former clients. I think that is all you can ask for and I will gladly comply with rules that we are all bound by. That should satisfy any "concern" that any of you have. To this end, I will not be describing Cristian's personality or detailing any discussions that he and I have. I do, however, think that anything that I have said up to this point has been very helpful to Cristian. I'm not sure if any of you understand the number of groups that I speak to on a weekly basis. Groups that have very ordinary citizens that would likely be the kind of people that would serve on a jury. Information that I talked about with WOKV, for example, is information that people in these groups (the everyday people) eat up. They don't want to see Cristian charged as an adult. They hope and want him to be like any other kid. EVERY single group that I speak to have questions about Cristian Fernandez. In fact, 9 times out of 10, it's first question asked. So, you may want to think twice and discuss it with each other before you "gag" me from talking about this case. Hopefully you've at least discussed it with your client. Either way, until I hear otherwise, I will be in full compliance with the rules mentioned above.

As a side note, while we are talking about confidentiality and conflicts of interest. A couple of things you should be aware of. One of you disclosed to an editor of a local publication that Cristian is innocent and the mother did it. This was brought to my attention when our office was still representing Cristian and I didn't get the opportunity to let you know before you all came in on the case. Also, I won't name names, but two of you have had extensive discussions of confidential information to people all over the state going back several weeks, if not months. The folks that you were talking to confidentially obviously weren't keeping your conversations a secret. Those folks discussed the matters with other elected PD's from a couple areas in the state and those elected PD's communicated it to me. I guess my point is, because this is such a high profile case, you may want to be careful who you are disclosing confidential information. I also know that one of you have spent several hours with a couple of lawyers that used to work in this office about the case and now they are talking about the information with other folks.

matt

From: Hank Coxe <hmc@bedellfirm.com>
Date: Thu, 9 Feb 2012 11:33:14 -0500
To: Matt Shirk <mas@pd4.coj.net>
Cc: "D. Gray Thomas" <dgraythomas.law@gmail.com>, <Buddy.Schulz@hklaw.com>
Subject: our conversation yesterday

Matt -- really appreciate your taking the time to talk with us yesterday afternoon. We have a conference with Judge Cooper right after lunch today and we need to know what your position is as soon as possible and hopefully beforehand.

thanks,

Hank

Henry M. Coxe, III

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immediately, delete the e-mail fr[illegible] your computer and do not copy or disclose it to anyone else. If you are not an existing client of ours, do not construe anything in this e-mail to make you a client unless it contains a specific statement to that effect and do not disclose anything to us in reply that you would expect us to hold in confidence. If you properly received this e-mail as a client, co-counsel or retained expert of ours, you should maintain its contents in confidence in order to preserve the attorney-client or work product privilege that may be available to protect confidentiality.

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FILED
AUG 0 7 2012
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NOS.: 16-2011-CF-06222-AXXX
16-2012-CF-00136-AXXX

DIVISION: CR-D

STATE OF FLORIDA,

vs.

CRISTIAN FERNANDEZ,
Defendant.
_____/

ORDER GRANTING, IN PART, AND DENYING, IN PART, DEFENDANT'S MOTIONS TO SUPPRESS STATEMENTS

This matter came before this Court on Defendant's Motion to Suppress Statements of June 15, 2011, Motion to Suppress Statements of June 23, 2011, Memorandum of Law in Support of Motions to Suppress Statements, and Supplemental Memorandum of Law in Support of Motions to Suppress Statements. This Court held an evidentiary hearing on June 28, June 29, July 2, and July 3, 2012. Upon consideration of the evidence presented, and having considered the arguments and authorities presented by the parties, and having otherwise been fully advised, this Court finds as follows:

Facts

On the evening of March 14, 2011, around 8:20 p.m., Officer Joey Devereaux of the Jacksonville Sheriff's Office ("JSO"), was dispatched to the residence of the twelve-year-old Defendant, with instructions to pick up Defendant and his younger brother, [redacted] No guardians or family members were present at the residence with Defendant and [redacted] Officer Devereaux took

EXHIBIT
tabbies
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them to the Police Memorial Building ("PMB") in his patrol car. Once there, Officer Devereaux led them to the family waiting area of the homicide detective division, where they stayed for several hours.

Around 1:30 a.m., JSO Detectives B. F. Houghland and Michelle Soehlig took Defendant out of the family waiting area and moved him to an open office area in the homicide division. The Detectives considered Defendant to be a witness in regard to fatal blunt force injuries inflicted upon his other younger brother, D.G. The Detectives would have normally interviewed Defendant in the family waiting area, however, that area was occupied by his family members. Defendant's mother, Biannela Susana, was also in the homicide division, but was considered a suspect and was in an interview room. Defendant did not know his mother was there.

During the initial interview of Defendant, Detective Soehlig questioned Defendant and Detective Houghland took notes. Detective Soehlig began the conversation by asking Defendant where he lives and goes to school. Detective Soehlig then asked Defendant what his knowledge was of how his brother was injured. Detective Soehlig also questioned Defendant about a previous leg injury to D.G. With regard to the leg injury, Defendant stated that D.G. fell from monkey bars. Detective Soehlig then asked if that was really what happened, and Defendant said D.G. did not fall from monkey bars. Defendant explained that it was an accident and that the injury occurred when he put D.G. in an Indian yoga move. Defendant stated that his mother told him to lie and say that D.G. had fallen.

In regard to the blunt force trauma, Defendant explained that D.G. had fallen from a bunk bed and hit his head on the ladder. Detective Soehlig asked Defendant to further explain and Defendant stated that D.G. was carrying books on his head, the books fell on his head, and then he

fell. Detective Soehlig told Defendant that the injuries were too severe to have been caused by a falling off a bunk bed or by books falling on D.G.'s head. Detective Soehlig believed that Defendant was covering for his mother and asked if his mother did something to D.G. Defendant stated that his mother did not do anything. Detective Soehlig then asked Defendant if he did something to D.G., and Defendant responded "um-hum." Defendant then became a potential suspect, and Detective Soehlig stopped the interview.

Detecive Soehlig then notified Defendant's mother that she was going to interview him. Defendant was taken to a recorded interview room. Due to Detective Soehlig's experience with talking with children, Detective Soehlig interviewed Defendant by herself.[1] Detective Soehlig wanted Defendant to feel comfortable, so she left the interview room door open. Detective Soehlig used a Constitutional Rights Form, and at 2:25 a.m., read Defendant's Constitutional rights to him:

> Detective: These are called your constitutional rights. And I know you're 12 years old, right?
>
> Defendant: Yeah.
>
> . . .
>
> Detective: Okay. All right. So I want to explain these to you to where you can understand them. Okay? I'm going to read it to you and then I'm going to explain to you what it means and then you can let me know if you understand them or not. Okay?
>
> Defendant: Okay.
>
> . . .
>
> Detective: . . . Okay. What this says is this is your constitutional rights. Okay? And this is what they mean. I'm going to read it to you. Okay? It

[1]During her time with the JSO, and prior to becoming a homicide detective, Detective Soehlig worked as a school resource officer, a child abuse detective, and a sex crimes detective.

says you have the following rights under the United States Constitution. The first one says you do not have to make a statement or say anything. Do you understand what that means Cristian?

Defendant: No.

Detective: Okay. This means you don't have to talk to me when I talk to you and you don't have to - - you don't have to tell me anything and you don't have to say anything, but you can say something. It just tells you that you don't have to. Do you understand what that means?

Defendant: Um-hum.

Detective: I'll read it again. You do not have to make a statement or say anything. So that means you don't have to talk to me, but I want you to talk to me, but you don't have to talk to me. Okay?

Defendant: Um-hum.

Detective: Okay. So you understand what that means?

Defendant: Um-hum.

Detective: Okay. The next one says anything - - anything you say can be used against you in court. Do you know what that means?

Defendant: Um-hum.

Detective: Okay. That means anything that you tell me today, it can come back up later in court. Okay? Do you understand what that means?

Defendant: Um-hum.

Detective: Okay. Yes?

Defendant: Um-hum.

Detective: I just need you to say yes.

Defendant: Yes.

Detective: Okay. The next one says you have the right to talk to a lawyer for advice before you make a statement or before any questions are asked

of you and to have the lawyer with you during any questioning. What that means is you can have a lawyer with you while I talk to you, but you don't have to. It just says that you can - - you have that right, that you can have one. Do you understand what that means?

Defendant: Um-hum.

Detective: Okay. The next one says that if you cannot afford to hire a lawyer, one will be appointed for you before any questioning if you wish. That means if you don't have the money for a lawyer - - which I know [you're] 12 so that would be your mom's, you know, responsibility to get a lawyer for you. If you don't have the money for one that we will give you one. Do you understand what that means?

Defendant: Um-hum.

Detective: Okay. The last one says if you do answer questions, you have the right to stop answering questions at any time and consult with a lawyer. That means while you're talking to me you can stop at any time, okay, and ask for a lawyer. Do you understand what that means?

Defendant: Um-hum.

Detective: Okay. I just wanted to explain that to you where you understood it. Okay?

Defendant: Okay.

(Evidentiary Hr'g tr. at 121-25, June 28, 2012.) Defendant then signed the Constitutional Rights Form. Detective Soehlig did not ask Defendant to explain the rights in his own words and stated that such an idea never occurred to her. Detective Soehlig has not received training about interrogating juveniles. Detective Soehlig stated that when giving Miranda warnings, she uses the same approach whether the suspect is a twelve-year-old child or a sixty-year-old man.

Following the administration of the Miranda rights, Defendant was interrogated regarding D.G.'s injuries. Once the interview with Defendant concluded, Detective Soehlig interviewed his

mother. Detective Soehlig instructed Defendant's mother to speak with Defendant about the incident. Detective Soehlig took Defendant to his mother's interview room, where Defendant's mother questioned him about what happened to D.G.

Both Defendant and his mother were subsequently arrested. On June 2, 2011, Defendant was indicted as an adult on the charges of First Degree Murder and Aggravated Battery. The following day, Defendant was transferred from a juvenile facility to the adult Duval County Detention Center. From June 3, 2011, through June 23, 2011, in an effort to keep Defendant separate from adult inmates, Defendant was held in an isolation cell at the detention center. During this period in isolation, Defendant received twenty visits, including Defendant's lawyers, and others working on his behalf, as well as personal visitors. On June 23, 2011, Defendant was transferred back to a juvenile facility.

On June 15, 2011, Detective Lisa Perez was assigned to a sex crime investigation involving Defendant and his younger brother, [redacted] During the course of her investigation, Detective Perez decided to interview Defendant. Detective Perez spoke to Detective Soehlig and learned that Defendant did not invoke his rights during his previous interrogation on March 15, 2011. Detective Perez also met with State Attorney Angela Corey and Assistant State Attorney Mark Caliel to discuss the upcoming interview. Prior to interviewing Defendant, Detective Perez did not attempt to contact Defendant's mother because she was charged in the same incident and Detective Perez did not contact Defendant's father because she was aware he had never been involved in Defendant's life. Nor did Detective Perez attempt to contact Defendant's lawyer, attorney ad litem, or legal custodian.

On June 23, 2011, Detective Perez, accompanied by Detective Whitaker, brought Defendant from the detention center to the PMB. Detective Perez explained to Defendant that she would like

to speak to him about a matter, but did not tell Defendant what the matter was. Detective Perez put Defendant in an interview room in the sex crimes office. While Detective Perez left the room to retrieve paperwork, Defendant looked around the room and stated, "I wonder where the camera is." Detective Perez returned and explained to Defendant that she was not there to discuss the charges upon which he was already incarcerated. Detective Perez then reviewed the JSO's Constitutional Rights Form with Defendant:

Detective: Before we start talking I have to redo your rights, okay, because you have the right to talk to me or the right not to talk to me. Okay? So I have to go over this paper with you and then when we're finished, if you're willing to talk, then you'll just sign the bottom and I'll sign the bottom also. Okay?

Defendant: Okay.

Detective: And I'll explain everything that I need to talk to you about. Okay?

Defendant: Okay.

. . .

Detective: I want you to read that top line for me.

Defendant: You have the following rights under the United States Constitution.

Detective: Okay. You do not have to make a statement or say anything. Do you understand that, Cristian?

Defendant: (Nods head.)

Detective: Anything you say can be used against you in court. Do you understand that, Cristian?

Defendant: Yeah.

Detective: You have the right to talk to a lawyer for advice before you make a statement or before any questions are asked [of] you and to have the lawyer with you during any questioning. Do you understand?

Defendant: Yeah.

Detective: If you cannot afford to hire a lawyer, one will be appointed before any questioning, if you wish. Do you understand?

Defendant: Yeah.

Detective: If you do answer questions, you have the right to stop answering questions at anytime and consult with a lawyer. Do you understand?

Defendant: Yeah.

Detective: Do you understand everything I've said?

Defendant: Yeah.

Detective: Okay. Do you wish to talk to me today, Cristian?

Defendant: I don't know what we're going to talk about.

Detective: Okay. Well, I'm going to get into that. I just have to make sure that you're willing to talk to me to find out what I'm wanting to talk to you about.

Defendant: Yeah.

Detective: Okay? All right. If you'll sign right there.

(Evidentiary Hr'g. tr. at 320-23, June 29, 2012.)

Defendant then signed the Constitutional Rights Form and Detective Perez interrogated him regarding the sex crimes investigation. Defendant did not ask to speak with a parent, guardian, or lawyer. As the interrogation was concluding, Defendant asked Detective Perez about the rights:

Detective: Okay. Do you want a drink of water or anything before we go back over?

Defendant: Well, was the - - the - - rules on paper actually will - - the rights were between you and me?

Detective: Yes. What do you mean? What are you asking me? I'm not sure.

Defendant: Like the right to have an attorney.

Detective: Um-hum.

Defendant: Oh, that's just the right?

Detective: The form?

Defendant: Um-hum.

Detective: Yeah. When we talked about that, that's basically, you know, me getting permission from you that you want to talk to me. And I couldn't have talked to you and learned all the things about you unless you said it was okay. And I appreciate you talking [to] me. And, you know, I - - hopefully none of this will happen t[redacted] anymore like it did to you and it shouldn't have happened to you. It's not supposed to happen to kids. Okay. All right. Any other questions?

Defendant: No.

(Evidentiary Hr'g. tr. at 375-76, June 29, 2012.) Defendant was subsequently charged with Sexual Battery.

The Instant Motions

In the instant Motions, Defendant seeks suppression of the statements he made on March 15, 2011 and June 23, 2011. These statements include Defendant's March 15, 2011 pre-Miranda statement to Detectives Soehlig and Hougland; Defendant's March 15, 2011 post-Miranda statements to Detective Soehlig; Defendant's March 15, 2011 statements to his mother; and Defendant's June 23, 2011 statements to Detective Perez. Defendant argues that 1) he was in custody at the time each of the statements were made; 2) he did not knowingly, intelligently, and voluntarily waive his Constitutional rights at any time prior to making these statements; and 3) his statements were not freely and voluntarily made. The State argues that Defendant was intelligent

and capable of understanding the Miranda warnings and that the totality of the circumstances demonstrate Defendant's understanding of the warnings.

Expert Testimony

During the evidentiary hearing, Defendant presented the expert testimony of Dr. David Fassler and Dr. Marty Beyer. Both experts opined that on March 15, 2011 and June 23, 2011, Defendant did not comprehend the Miranda warnings, and did not knowingly, intelligently, and voluntarily waive his Constitutional rights.

A. Opinion of Dr. David Fassler

Dr. Fassler is a board certified child and adolescent psychiatrist, as well as a clinical professor. Dr. Fassler interviewed Defendant for five hours on February 23, 2012 and again at the end of May 2012. Dr. Fassler reviewed materials related to Defendant and the instant cases, including the DVDs of both interrogations, Defendant's educational records, Defendant's Department of Children and Families ("DCF") records, and the JSO's Constitutional Rights Form. Dr. Fassler also reviewed reports by Dr. Beyer, a defense expert, and by Dr. William Meadows, an expert for the State.

Dr. Fassler opined that at the time of the two interrogations, given the totality of the circumstances and Defendant's background, Defendant was not able to fully comprehend, understand, or interpret the Miranda warnings, or appreciate the consequences of the decisions he was making. Dr. Fassler explained that at the age of twelve, Defendant would have been at the earliest stages of adolescent brain development, and therefore, his executive functioning would have been under-developed. Dr. Fassler stated that Defendant's executive functions were further impaired due to his exposure to stress, abuse, trauma, and violence.

Dr. Fassler opined that even under the best of circumstances, it would be difficult for a twelve-year-old to understand Miranda warnings and the implications of waiving Constitutional rights. In Defendant's circumstances, Dr. Fassler stated there were many additional factors which compromised his ability to understand and appreciate the consequences of waiving his rights. Specifically, stress, sleep deprivation, his history of abuse, his expressive and receptive language deficits, and his learning disabilities impaired Defendant's appreciation.

Dr. Fassler stated that Defendant's understanding would have also been impaired because of how the detectives administered the warnings. Dr. Fassler stated that the warnings were administered quickly and orally and that it is more difficult for young people to understand when information is presented orally. Dr. Fassler opined that one cannot gauge a child's understanding of Miranda warnings without having the child explain their understanding of each right.

Further, Dr. Fassler testified that Defendant's confusion was evident, specifically with regard to the June 23, 2011 interrogation, where he asked about the rules on the paper and the rights being between him and the Detective. Dr. Fassler also testified that when he met with Defendant, Defendant still had significant confusion regarding legal terms.

B. Opinion of Dr. Marty Beyer

Dr. Beyer is a clinical psychologist and juvenile justice/child welfare consultant and was retained for the purpose of assessing Defendant's ability to comprehend Miranda warnings. Dr. Beyer interviewed Defendant for thirteen hours at the juvenile detention center and saw Defendant again a few weeks prior to the evidentiary hearing. Dr. Beyer interviewed Defendant's mother and aunt, as well as Defendant's detention center teacher, counselor, and unit staff. Dr. Beyer also reviewed Defendant's school records, DCF records, the DVDs of both interrogations, and the reports

prepared by Dr. Fassler and Dr. Meadows.

At the time of Dr. Beyer's interview of Defendant, she found him to be an emotionally fragile twelve-year-old. Dr. Beyer stated that Defendant was highly anxious, especially when talking about his home life. Dr. Beyer testified that Defendant was emotionally immature for his age. Dr. Beyer also observed immature thinking on the part of Defendant, noting that he often could not see more than one choice and that he had difficulty comprehending the outcomes of his actions.

Dr. Beyer opined that Defendant was unable to knowingly, intelligently, and voluntarily waive his rights during both the March 15, 2011 and the June 23, 2011 interrogations. According to Dr. Beyer, Defendant's immature thinking impaired his comprehension of the Miranda warnings. Dr. Beyer testified that Defendant, during the March 15, 2011 interrogation, could only see one option and did not believe that he could say no to the police. Dr. Beyer stated that, in addition, Defendant did not understand the importance of the interview and could not look ahead to see how the interview might be used against him in future court proceedings. Dr. Beyer stated that Defendant, in the June 23, 2011 interrogation, did not have a future perspective about what might happen after the questioning.

Dr. Beyer testified that certain stressors can reduce a young person's maturity of thought, and Defendant was subject to the stressors of being interviewed in the early morning hours with lack of sleep and of being in isolation for a long period of time. Dr. Beyer also testified that trauma can impact development in children and interfere with all aspects of a child's functioning. Dr. Beyer stated that Defendant experienced a tremendous amount of trauma in his life, the effects impacting his maturity, and therefore, his ability to comprehend Miranda warnings.

Further, Dr. Beyer opined that due to his cognitive impairments, Defendant could not

understand Miranda warnings that were read aloud quickly and without explanation. In interviewing Defendant, Dr. Beyer found that Defendant could explain the meanings of some of the words in Miranda, but that he had difficulty with abstract thinking, which affected his ability to define a word like "right." Dr. Beyer testified that due to his impairments, Defendant could not understand his Miranda rights.

Dr. Beyer believed that Defendant's contact with lawyers in between the two interrogations did not improve his capacity to understand the warnings. Dr. Beyer explained that presence in court did not indicate comprehension. Dr. Beyer also testified that Defendant told her he had not learned anything more about his rights between the two interrogations. Additionally, when Dr. Beyer interviewed Defendant in January 2012, it was her opinion that Defendant still did not understand his Miranda rights. Finally, Dr. Beyer stated that Defendant's questions to Detective Perez, posed at the end of the June 23, 2011 interrogation, reflect that he did not comprehend that his statements could be used in court.

The March 15, 2011 pre-*Miranda* statement and custody determination

"A person is in custody if a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest." Ramirez v. State, 739 So. 2d 568, 573 (Fla. 1999). "The proper inquiry is not the unarticulated plan of the police, but rather how a reasonable person in the suspect's position would have perceived the situation." Id. (quoting Davis v. State, 698 So. 2d 1182, 1188 (Fla. 1987)). There are four factors that provide guidance to determine whether a reasonable person would consider himself to be in custody:

1) The manner in which police summon the suspect for questioning; 2) The purpose,

> place, and manner of the interrogation; 3) The extent to which the suspect is confronted with evidence of his or her guilt; 4) Whether the suspect is informed that he or she is free to leave the place of questioning.

Ramirez, 739 So. 2d at 574. Further, a child's age is relevant to the objective custody analysis. J.D.B. v. North Carolina, 131 S.Ct. 2394, 2403-2408 (2011). Thus, this Court must determine whether a reasonable twelve-year-old in Defendant's situation would have believed he was in custody.

Defendant was left unsupervised at home, with his younger five-year-old brother. Officer Devereaux picked up Defendant and his brother at their residence. The only available seating in Officer Devereaux's patrol car was the backseat. Therefore, Defendant and his brother were placed there. Defendant and his brother were not handcuffed and were not subject to a pat-down.

Once they arrived at the PMB, Defendant and his brother were taken through a public entrance to the waiting room area of the homicide office. This area is one with comfortable seating and magazines. While Defendant was not free to leave the homicide office because he was an unsupervised juvenile and the DCF had been called to determine his placement, he was free to move around the waiting area, and the door to this area remained open. Detectives Soehlig and Houghland then moved Defendant to an open office area of the homicide division so they could question Defendant as a witness.[2] Defendant was removed from the waiting area because it was crowded, and the open office area to which he was moved was within sight of the waiting area where his siblings remained. Defendant was not placed in an interrogation room. Moreover, Detective Soehlig did not confront Defendant with evidence of his guilt, but did specifically ask if Defendant's mother did something to D.G.

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[2]This Court recognizes that the subjective views of the Detectives are irrelevant.

Under these circumstances, this Court finds that a reasonable twelve-year-old would not think that his freedom of action was curtailed to a degree associated with actual arrest. As such, no Miranda warnings were required to be administered, and Defendant's statements are admissible.

The March 15, 2011 post-*Miranda* statements to Detective Soehlig and Defendant's mother

"[T]he requirement of giving Miranda warnings before custodial interrogation is a prophylactic rule intended to ensure that the uninformed or uneducated in our society know they are guaranteed the rights encompassed in the warnings." Davis, 698 So. 2d at 1189. It is the State's burden to prove that the waiver of Miranda rights was knowingly, voluntarily, and intelligently given. Ramirez, 739 So. 2d at 575. When the suspect is a juvenile and waives his Miranda rights, the State bears a "heavy burden" to prove that the rights were knowingly and voluntarily waived. Id.

The determination of whether an individual validly waives his Miranda rights is subject to the following inquiry:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421 (1986) (citations omitted). There are five factors which aid the Moran analysis: 1) The manner in which the Miranda rights were administered, including any cajoling or trickery; 2) The suspect's age, experience, background and intelligence; 3) Whether the suspect's parents were contacted and the juvenile was given an opportunity to consult with his

parents before questioning; 4) Whether the questioning took place in the station house; and 5) Whether the interrogators secured a written waiver of the Miranda rights at the outset of the interrogation. Ramirez, 739 So. 2d at 576. This Court finds the second prong of the Moran analysis to be most applicable in the instant case, that is, whether Defendant waived his rights fully knowing the nature of the rights being abandoned and the consequences of the decision to abandon them. Also particularly applicable to the instant analysis is Defendant's age, experience, background, and intelligence.

The expert testimony at the evidentiary hearing established that Defendant did not waive his rights with a full awareness of the nature of the rights being abandoned and the consequences of the decision to abandon them. Dr. Fassler testified that even under the best of circumstances, it would be difficult for any twelve-year-old to understand Miranda warnings and the consequences of waiving their rights. Dr. Fassler stated that there were many additional factors which compromised Defendant's ability to appreciate the consequences of waiving his rights. These additional factors included stress, sleep deprivation, a history of abuse, expressive and receptive language deficits, and learning disabilities. Ultimately, Dr. Fassler opined that given the totality of the circumstances and Defendant's background, Defendant was not able to fully comprehend, understand, or interpret the Miranda warnings. Moreover, Defendant did not appreciate the consequences of the decisions he was making.

Dr. Beyer also opined that Defendant was unable to knowingly, intelligently, and voluntarily waive his Miranda rights. Dr. Beyer stated that Defendant's comprehension was impaired by his immature thinking, that Defendant did not understand the importance of the March 15, 2011 interview, and that Defendant could not see how it could be used against him in future court

proceedings.

At the time of the post-Miranda interrogations during the early morning hours of March 15, 2011, Defendant was a twelve-year-old who had no prior experience with the legal system. When Detective Soehlig first began to review the Constitutional Rights Form with Defendant, he indicated that he did not understand the right to remain silent. Detective Soehlig then explained, "Okay. This means that you don't have to talk to me when I talk to you and you don't have - - you don't have to tell me anything and you don't have to say anything, but you can say something. It just tells you that you don't have to." (Evidentiary Hr'g. tr. at 123, June 28, 2012.) From that point on, Defendant indicated that he understood each of the remaining rights. During the interrogation, Defendant appeared alert and responsive. At no point in time did Detective Soehlig believe that Defendant did not understand what he was being asked about. While Defendant may have appeared responsive and intelligent during the interrogation, this Court cannot ignore the fact that Defendant was a 12 year-old child with no knowledge of the legal system. Moreover, this Court cannot ignore expert testimony that Defendant was unable to fully comprehend the Miranda warnings or appreciate the consequences of waiving his rights.

This Court finds that the State did not meet its burden of establishing that Defendant's rights were knowingly and voluntarily waived. This Court further finds that Defendant did not completely comprehend the Miranda warnings or the consequences of waiving his rights. Therefore, the post-Miranda statements Defendant made to Detective Soehlig and his mother on March 15, 2011 must be suppressed.

The June 23, 2011 statements to Detective Perez

On the morning of June 23, 2011, Defendant was taken from the adult detention facility to

the sex crimes office of the PMB, for the purpose of an interview. Prior to interviewing Defendant, Detective Perez did not contact Defendant's mother because she was charged in the same incident and Detective Perez did not contact Defendant's father because she was aware that his father had never been involved in his life. Nor did she contact Defendant's lawyer, attorney ad litem, or legal custodian.

Once Defendant was placed in the interrogation room, Defendant can be seen looking around the room and stating, "I wonder where the camera is." Detective Perez entered the room and began to review the Constitutional Rights Form with Defendant. Detective Perez read each right verbatim, and after each statement, asked Defendant if he understood. Defendant responded affirmatively each time, either saying "yeah," or nodding his head. Detective Perez testified that at no point in time did Defendant not seem to understand the words she was telling him. Throughout the interrogation, Defendant appeared to understand the questions asked and was able to appropriately respond to the questions. At the conclusion of the interrogation, Defendant posed a question to Detective Perez regarding his Miranda rights.

The State argues that as Defendant had more exposure to the criminal justice system at this point in time, Defendant was able to comprehend the Miranda warnings. The State points to the fact that Defendant had already been through the March 15, 2011 interrogation, as well as the fact that Defendant was assigned legal counsel. Defendant met with his lawyers on multiple occasions, and they appeared with Defendant in both adult and juvenile court. Defendant's lawyers had met with him as recently as the day before the June 23, 2011 interrogation. Seemingly at this point in time, Defendant had a better understanding of the Miranda rights and the implications of waiving those rights based on his experience in the legal system. Indeed, Defendant's statement at the beginning

of the interrogation - "I wonder where the camera is" - supports the State's argument that Defendant had more insight into the legal process.

Nevertheless, the experts unanimously agreed that during the June 23, 2011 interview Defendant was unable to comprehend the Miranda warnings or appreciate the consequences of waiving his rights. Dr. Fassler specifically testified that Defendant did not have a better understanding of legal terms at the time of the second interview and that Defendant still had significant confusion about legal terms. Dr. Beyer explained that Defendant's contact with his lawyers and his presence in court was not indicative of his comprehension. Dr. Beyer also testified that when she interviewed Defendant in January 2012, Defendant still did not understand his Miranda rights.

This Court finds Defendant's question posed to Detective Perez at the conclusion of the interrogation troublesome. Defendant asked her: "Well, was the - - the - - rules on paper actually will - - the rights were between you and me?" (Evidentiary Hr'g. tr. at 375, June 29, 2012.) This question clearly indicated that Defendant did not completely comprehend his rights. Also, both experts testified that this question makes Defendant's confusion evident.

Therefore, this Court finds that the State has not met its burden of establishing that Defendant's rights were knowingly and voluntarily waived. This Court additionally finds that at the time of the June 23, 2011 interrogation, Defendant did not comprehend the Miranda rights, or the consequences of waiving them. Thus, Defendant's statements to Detective Perez must be suppressed.

Based on the foregoing, it is:

ORDERED AND ADJUDGED that:

1. Defendant's Motion to Suppress Statements of June 15, 2011 is **GRANTED, in part**, and **DENIED, in part.**

2. Defendant's pre-Miranda statements made to Detectives Soehlig and Houghland on March 15, 2011 are admissible.

3. Defendant's post-Miranda statements made to Detective Soehlig and his mother on March 15, 2011 must be suppressed.

4. Defendant's Motion to Suppress Statements of June 23, 2011 is **GRANTED.**

DONE AND ORDERED in Chambers in Jacksonville, Duval County, Florida this 7 day of August, 2012.

Mallory D. Cooper
CIRCUIT COURT JUDGE

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Case Nos.: 16-2011-CF-06222-AXXX; 16-2012-CF-00136-AXXX

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FILED 12DEC04PM02:50 JIM FULLER

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November 30, 2012

The Honorable Mallory D. Cooper
Duval County Courthouse
330 E. Bay Street, Room 605-4
Jacksonville, FL 32202

Re: State of Florida v. Cristian Fernandez
Case Nos. 16-2011-CF-006222-AXXX
and 16-2012-CF-000136-AXXX

Dear Judge Cooper:

Enclosed please find an Order of Continued Confidentiality which the parties have consented to be entered by the Court. All of the affected agencies have consented to this Order. The consents have all been by e-mail, and we have retained all of the e-mails if the Court wishes to review them. If may be that the Court wishes instead to make this letter a part of the record to accompany the Order.

Please do not hesitate to contact me if there are any questions.

Sincerely,

Henry M. Coxe, III

HMC:gad
Enclosure

cc: Mark Caliel, Esquire

EXHIBIT
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FILED 12DEC04PM0250JIM FULLER

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NOS.: 16-2011-CF-6222
16-2012-CF-136

DIVISION: CR-D

STATE OF FLORIDA

v.

CRISTIAN FERNANDEZ,

Defendant.
_____/

ORDER OF CONTINUED CONFIDENTIALITY

THIS CAUSE came before the Court at the request of the Defendant Cristian Fernandez, pursuant to the Amended Protective Order entered by this Court on August 4, 2011, and the Order Granting Motion to Receive Certain Evidence In Camera entered by this Court on June 28, 2012. The Court now being fully advised in the premises, with both parties present, it is hereby **ORDERED** and **ADJUDGED** that:

1. On August 4, 2011, this Court entered an Amended Protective Order in Case No. 16-2011-CF-6222. The purpose of the Amended Protective Order was to prevent the release, publication or dissemination of alleged collateral bad acts related to the Defendant in order to preserve the Defendant's fundamental and Constitutional right to a fair trial. (Amend. Prot. Order, ¶ 1). The Court recognized in the Amended Protective Order that the release and publication of alleged collateral bad acts "would pose a substantial and imminent threat to the Defendant's ability to receive a fair trial." (Amend. Prot. Order, ¶ 5). The Amended Protective Order was intended to remain in full effect until Case No. 16-2011-CF-6222 is closed.

2. Subsequent to the Amended Protective Order being entered, the State obtained an indictment for sexual battery in Case No. 16-2012-CF-136. While the Amended Protective Order

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J. BAILEY

was never officially entered in that case, the Court and the parties proceeded with the understanding that the same rules limiting the release and disclosure of confidential and unduly prejudicial information for the purpose of protecting the right to a fair trial would govern in both cases.

3. Consistent with that understanding, the Court directly addressed confidentiality of information in both cases on June 28, 2012, prior to a joint evidentiary hearing on Motions to Suppress filed in both cases. In its Order Granting Motion to Receive Certain Evidence in Camera, dated June 28, 2012, the Court ordered that portions of taped statements, which contained allegations of the underlying charges as well as other alleged collateral bad acts, would be received *in camera* and closed to the media. Throughout the four day evidentiary hearing, the Court repeatedly closed additional portions of the hearing from the public and media to preserve the confidentiality of alleged collateral bad acts and other potentially unduly prejudicial information.

4. On November 8, 2012, the State issued a Nolle Prosequi in Case No. 16-2012-CF-136, thus dismissing the sexual battery case. After dismissal, the State released to the media, pursuant to a public records request, a Disposition Statement that detailed many of the underlying allegations as well as alleged collateral bad acts. While the sexual battery case is no longer pending, the release of such information continues to pose a significant threat to the Defendant's right to a fair trial and an impartial jury in Case No. 16-2011-CF-6222, which remains pending.

5. This Court has the inherent authority, and indeed the responsibility, "to protect a defendant in a criminal prosecution from inherently prejudicial influences which threaten [the] fairness of his trial and the abrogation of his constitutional rights." Miami Herald Publishing Co. v. Lewis, 426 So.2d 1, 4 (Fla. 1983). The Supreme Court of the United States has specifically stated that "a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity."Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 378 (1979).

6. Furthermore, Florida Statutes, including § 985.04, impose a continuing obligation on agents of the State to maintain confidential information learned or acquired during the course of the criminal proceedings, an obligation that continues even after the cases are closed.

7. Pursuant to the inherent authority and Constitutional duty outlined by the United States and Florida Supreme Courts and Florida Statutes, and in order to preserve and protect the Defendant's Constitutional right to a fair trial and an impartial jury, it is **ORDERED** that:

(a) the Amended Protective Order remains in full force and effect; and

(b) neither the State, nor any agent of the State, including the State Attorney's Office, Jacksonville Sheriff's Office, Department of Juvenile Justice, Department of Children and Families, Child Protection Team, Mental Health Resource Center, and Jewish Family and Community Services, shall release or disseminate any information to the public or to the media concerning any allegation of either Case No. 16-2011-CF-6222 or Case No. 16-2012-CF-136, or any alleged collateral bad act whatsoever relating to the Defendant.

8. The Court finds that there is no less restrictive means to preserve the fundamental rights at issue. To the extent that this Order conflicts with any provision of Chapter 119 of Florida Statutes or any other law or regulation pertaining to public records, this Order shall be deemed to supersede such law or regulation and to control, until otherwise ordered by this Court or until the closure, whether by adjudication or otherwise, of Case No. 16-2011-CF-6222.

DONE AND ORDERED in Chambers in Jacksonville, Duval County, Florida this 4 day of ~~November~~ December, 2012.

MALLORY D. COOPER
CIRCUIT COURT JUDGE

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162011CF6222AXXXMA

DIVISION: CR-D

FILED
FEB 08 2013
CLERK CIRCUIT COURT

STATE OF FLORIDA

vs.

CRISTIAN FERNANDEZ

PLEA OF GUILTY TO LESSER INCLUDED OFFENSES

I, Cristian Fernandez, hereby enter my plea of guilty to Manslaughter, a lesser included offense of First Degree Murder, and Aggravated Battery, a lesser included offense of Aggravated Child Abuse.

I. FREE AND VOLUNTARY NEGOTIATED SENTENCE

My attorneys, the State of Florida, and I have negotiated my case and have agreed that:

A. As to Count One, First Degree Murder:

I shall plead guilty to Manslaughter, F.S.782.07(1), a lesser included offense of First Degree Murder. In exchange for my plea of guilty to Manslaughter, I will be sentenced as a juvenile. I will be adjudicated delinquent of Manslaughter and my sentence will be as follows:

1) I will be committed to a secure facility within the Department of Juvenile Justice until my 19th birthday, January 14, 2018. I will not be eligible for release and the Court will not authorize my release until I am nineteen (19) years of age. (I and the State agree that the Department of Juvenile Justice's ability to authorize this commitment is documented by the January 23, 2013 correspondence from DJJ Legal Counsel to the State Attorney and attached hereto as Exhibit A);

2) I will undergo a Level III Comprehensive Evaluation (see Exhibit B attached hereto) to include all examinations and assessments included within the Level III Comprehensive Evaluation, as provided for in the DJJ Provider Contract, and I will comply with any recommended treatment;

3) I will be required to continue my education while I am committed and I will attempt to obtain my high school diploma or GED.

B. As to Count Two, Aggravated Child Abuse:

I shall plead guilty to Aggravated Battery, F.S. 784.045, a lesser included offense of Aggravated Child Abuse. In exchange for my plea of guilty to Aggravated Battery, I will be sentenced as an adult, and I waive my right to be sentenced as a Juvenile. Adjudication of guilt will be withheld (no conviction) and my sentence will be as follows:

EXHIBIT
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1) Probation:

I will serve eight (8) years of probation, to begin upon my release from juvenile commitment, with the following special conditions:

(a) I will be required to either attend school full-time, or maintain full-time employment. If I am not a full-time student or employed full-time, I will be required to demonstrate to my supervising probation officer, my good faith efforts to find employment;

(b) I will be required to continue any treatment or counseling recommended as a result of the Level III Comprehensive Evaluation conducted by the Department of Juvenile Justice during the course of my commitment (see Exhibit B attached hereto).

(c) I will have no contact with my former siblings, unless initiated by the sibling, the sibling's parent(s) or the sibling's guardian(s).

(d) I will have no unsupervised contact with minors under the age of sixteen (16) without the prior approval of my probation officer.

2) Early Termination: My probation will terminate after five (5) years if I am in compliance with all conditions of probation.

3) Consecutive Sentence: This sentence for Aggravated Battery will run consecutive to the sentence for Manslaughter.

4) Credit Time: It is agreed that should I violate probation and be sentenced to incarceration for violation of probation, I will receive credit for time served in juvenile commitment from March 14, 2011 until my release, and any other credit I am entitled to by law.

II. ADVISED OF RIGHTS

I understand that by pleading guilty I give up the following constitutional rights:

the right to trial by the Judge or jury; the right to remain silent; the right to put on witnesses on my own behalf; the right to confront the witnesses against me; the right to have the State prove its charges against me; and on the charges to which I have pleaded guilty, I give up the right against self-incrimination.

I further understand that by this plea of guilty I am waiving any and all right of appeal under both state and federal law of any of the issues which have already been raised or might be raised in the trial of this case.

I am aware that if there is physical evidence in this case, it may or may not contain DNA evidence, which may be tested. I understand that I have a right to such testing.

III. DISCUSSION WITH ATTORNEYS

Before entering this plea of guilty, I was advised of the nature of the charges against me, any lesser included offenses within the charges, the range of allowable punishments thereunder, the possible defenses to the charges, circumstances in mitigation thereof, and all other facts essential to a broad understanding of the charges against me.

My attorneys have answered all of my questions. I am satisfied with the services that my attorneys have rendered in this case on my behalf. I specifically waive any further discovery including any discovery regarding possible DNA evidence.

IV. READ AND EXPLAINED BY MY ATTORNEYS

My attorneys and I have read this agreement privately, and they have explained all parts of it to my satisfaction and understanding. I have had sufficient time to consider the charge against me, the possible defenses, the advice of my attorneys, the waiver of constitutional rights by entering my plea of guilty and to reflect upon the consequences of my plea.

I am not under the influence of alcohol, drugs, prescription medication, substances or conditions which interfere with my understanding and appreciation of this plea and the consequences of it. When I reviewed this agreement with my attorneys, I was not under the influence of any such substance or condition.

I understood this Plea of Guilty to Lesser Included Offenses when I signed my name below and it is true and correct.

Cristian Fernandez
DEFENDANT

Hugh Cotney
Guardian Ad Litem, on behalf of Cristian Fernandez

Donald D. Anderson
Counsel for Cristian Fernandez

Adam M. Blank,
Counsel for Cristian Fernandez

Henry M. Coxe, III
Counsel for Cristian Fernandez

Bryan Gowdy
Counsel for Cristian Fernandez

Nancy Johnson
Counsel for Cristian Fernandez

Melissa W. Nelson
Counsel for Cristian Fernandez

George E. Schulz, Jr.,
Counsel for Cristian Fernandez

D. Gray Thomas
Counsel for Cristian Fernandez

WITNESS
Deputy Clerk of Court

Mark Caliel
Assistant State Attorney

The Honorable Mallory Cooper
Circuit Court Judge

EXHIBIT A

From: Berkowitz, Brian [mailto:Brian.Berkowitz@djj.state.fl.us]
Sent: Wednesday, January 23, 2013 3:47 PM
To: Caliel, Mark
Subject: sentencing options

Mark: I hope this is helpful to the resolution of this case.

If the adult Court finds the youth delinquent and commits him to the Department, the Court can determine the restrictiveness level for the youth. The Department will generally have made a recommendation of a restrictiveness level to the court, but it does not challenge the court on the level chosen. (the only exception to that is when the court orders placement at a level for which the youth is statutorily excluded-i.e., a youth with a sex offense ordered to a low risk placement. Even then, it would be rare for the Department to make a challenge.) There are five levels, maximum, high, moderate, low, and minimum/non-residential. The maximum and high facilities, and many of the moderate facilities, are very similar in physical structure-razor wire around the facilities, sally ports for transportation, single (or double) cell occupancy, etc. Neither high nor max allow community access for the youth, and moderate risk access must be approved by the court. Our maximum risk programs are our "juvenile correctional facilities" which have a statutory prescribed length of stay between 18 and 36 months. (The 36 month is not a maximum commitment to the Department, but only applies to the maximum risk program)(985.465) If a youth completes 36 months at a max-risk program, and is not ready for release, the Department can seek to have him or her transferred to a different restrictiveness level or move him or her to a different program at the same level.

All of the commitments to the Department are until age 21, unless otherwise released by the Department or the maximum statutory term is reached. One thing of significance is that the Department cannot unilaterally release a youth or move him or her to a different restrictiveness level

than ordered by the Court. (985.441(3) and 985.445(3)) If the Department determines that a youth has completed his program and is ready for transfer from a residential program to a lower level residential program, or release from a residential program to a non-residential conditional release program, or a direct non-supervised release, it must notify the court and the attorneys of record. The court has 10 days to review the request and can grant it, deny it, or hold a hearing on the request. (if the youth was tried in the adult court, the court has 14 days to review the request) The Court has complete discretion in determining whether to release the youth. However, if the court does not take any action within the 10 or 14 days, the request is deemed granted. As a practical matter, I am not aware of the Department releasing a youth based on not hearing from the court. Some juvenile judges will leave the discretion for the release to the Department, so they don't respond to the requests. The Department follows up on the request before any release is made. In an a adult court case and other high profile cases, the Department is very careful to get an affirmative response from the court.

One issue is if the youth is committed to the Department for a specific term or for a minimum length of commitment, i.e., no release for at least 5 years. Our opinion is that would not be a "legal" sentence, but the Department would not challenge it. However, the Department, as part of its statutory duties, might still submit a request for a release (or transfer to a lower restrictiveness level) if it thinks it appropriate. Again, the adult court controls the release or transfer of the youth up until age 21.

Also, under s.985.565(c), (printed below) if the department determines that a juvenile sanction is unsuitable, it shall return the youth to the adult sentencing court. The court can then impose any sentence it could have lawfully imposed previously.

This is an arcane area of the law, and I will be glad to respond to any additional questions. Also, Laura Moneyham, the Assistant Secretary for Residential Services who was with us in Jacksonville, can answer any questions regarding the programs, the restrictiveness levels, and, if you would like, a tour of a high or max risk facility. Let me know if we can be of further assistance including being available to answer any questions from the court.

985.565: (b) *Juvenile sanctions.*—For juveniles transferred to adult court but who do not qualify for such transfer under s. 985.556(3) or s. 985.557(2)(a) or (b), the court may impose juvenile sanctions under this paragraph. If juvenile sentences are imposed, the court shall, under this paragraph, adjudge the child to have committed a delinquent act. Adjudication of delinquency shall not be deemed a conviction, nor shall it operate to impose any of the civil disabilities ordinarily resulting from a conviction. The court shall impose an adult sanction or a juvenile sanction and may not sentence the child to a combination of adult and juvenile punishments. An adult sanction or a juvenile sanction may include enforcement of an order of restitution or probation previously ordered in any juvenile proceeding. However, if the court imposes a juvenile sanction and the department determines that the sanction is unsuitable for the child, the department shall return custody of the child to the sentencing court for further proceedings, including the imposition of adult sanctions. Upon adjudicating a child delinquent under subsection (1), the court may:

1. Place the child in a probation program under the supervision of the department for an indeterminate period of time until the child reaches the age of 19 years or sooner if discharged by order of the court.
2. Commit the child to the department for treatment in an appropriate program for children for an indeterminate period of time until the child is 21 or sooner if discharged by the department. The department shall notify the court of its intent to discharge no later than 14 days prior to discharge. Failure of the court to timely respond to the department's notice shall be considered approval for discharge.
3. Order disposition under ss. 985.435, 985.437, 985.439, 985.441, 985.45, and 985.455 as an alternative to youthful offender or adult sentencing if the court determines not to impose youthful offender or adult sanctions.

(c) *Adult sanctions upon failure of juvenile sanctions.*—If a child proves not to be suitable to a commitment program, juvenile probation program, or treatment program under paragraph (b), the department shall provide the sentencing court with a written report outlining the basis for its objections to the juvenile sanction and shall simultaneously provide a copy of the report to the state

attorney and the defense counsel. The department shall schedule a hearing within 30 days. Upon hearing, the court may revoke the previous adjudication, impose an adjudication of guilt, and impose any sentence which it may lawfully impose, giving credit for all time spent by the child in the department. The court may also classify the child as a youthful offender under s. 958.04, if appropriate. For purposes of this paragraph, a child may be found not suitable to a commitment program, community control program, or treatment program under paragraph (b) if the child commits a new violation of law while under juvenile sanctions, if the child commits any other violation of the conditions of juvenile sanctions, or if the child's actions are otherwise determined by the court to demonstrate a failure of juvenile sanctions.

985.445 (3) Any commitment of a delinquent child to the department must be for an indeterminate period of time, which may include periods of temporary release; however, the period of time may not exceed the maximum term of imprisonment that an adult may serve for the same offense, except that the duration of a minimum-risk nonresidential commitment for an offense that is a misdemeanor of the second degree, or is equivalent to a misdemeanor of the second degree, may be for a period not to exceed 6 months. The duration of the child's placement in a commitment program of any restrictiveness level shall be based on objective performance-based treatment planning. The child's treatment plan progress and adjustment-related issues shall be reported to the court quarterly, unless the court requests monthly reports. The child's length of stay in a commitment program may be extended if the child fails to comply with or participate in treatment activities. The child's length of stay in the program shall not be extended for purposes of sanction or punishment. Any temporary release from such program must be approved by the court. Any child so committed may be discharged from institutional confinement or a program upon the direction of the department with the concurrence of the court. The child's treatment plan progress and adjustment-related issues must be communicated to the court at the time the department requests the court to consider releasing the child from the commitment program. The department shall give the court that committed the child to the department reasonable notice, in writing, of its desire to discharge the child from a commitment facility. The court that committed the child may thereafter accept or reject the request. If the court does not respond within 10 days after receipt of the notice, the request of the department shall be deemed granted. This section does not limit the department's authority to revoke a child's temporary release status and return the child to a commitment facility for any violation of the terms and conditions of the temporary release.

Brian Berkowitz
General Counsel
Department of Juvenile Justice
ph. (850) 921-4129
fax (850) 921-4159

EXHIBIT B

Level III Evaluation

A Level III evaluation is for the youth of a higher need being referred for a comprehensive evaluation. The Provider shall compile into one location all the information and analysis deemed appropriate based on the protocols, indicated needs and special needs of the youth and program requirements in the area. This level evaluation may include a psychosexual examination, neurological information, psychological analysis, psychiatric analysis, educational testing and review, and in depth vocational testing and analysis. The Provider shall address the types of analysis, testing and evaluation that shall be undertaken as part of a level III evaluation for all youth who are indicated for by the PACT or SAMH-II as in need of further evaluation and any special needs indicated by the health examination, clinical diagnosis or circuit probation staff that resulted in a request for a level III comprehensive evaluation. The comprehensive evaluation shall include recommendations for treatment for any identified diagnoses. The Provider shall include recent child status information as gathered from the youth and family and ensure all domains have been addressed within the comprehensive evaluation protocol format. Components include:

a. Overview of youth in each domain.

b. Compilation of existing documented information.

c. Emphasis on domain(s) that are indicated as higher need.

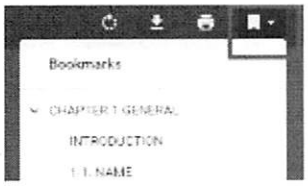
d. Youth status update through interview of the youth and parent.

e. Extensive evaluation and examination of high need areas.

RULES REGULATING THE FLORIDA BAR

Rules Regulating The Florida Bar

The Supreme Court of Florida by these rules establishes the authority and responsibilities of The Florida Bar, an official arm of the court. See the **Rules Update page** for pending rule changes or other related announcements.



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RRTFB Chapter 1:
General (Membership, Leadership, Programs, Records, etc.)

RRTFB Chapter 2:
Bylaws of The Florida Bar (Board of Governors, Elections, Meetings, Fiscal Management, Policies, Rules, etc.)

RRTFB Chapter 3:

EXHIBIT
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Rules of Discipline

RRTFB Chapter 4:
Rules of Professional Conduct

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Military Legal Assistance Counsel Rule

RRTFB Chapter 19:
Center for Professionalism

RRTFB Chapter 20:
Florida Registered Paralegal Program

RRTFB Chapter 21:
Military Spouse Authorization to Engage in the Practice of Law in Florida

RULE 1-8.3 BOARD OF LEGAL SPECIALIZATION AND EDUCATION

The board of governors shall establish the board of legal specialization and education to function as a central administrative board to oversee specialization regulation in Florida in accordance with chapter 6.

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252).

RULE 1-8.4 CLIENTS' SECURITY FUND

The board of governors may provide monetary relief to persons who suffer reimbursable losses as a result of misappropriation, embezzlement, or other wrongful taking or conversion of money or other property in accordance with chapter 7.

Amended April 12, 2012, effective July 1, 2012 (SC10-1967).

1-9. YOUNG LAWYERS DIVISION
RULE 1-9.1 CREATION

There shall be a division of The Florida Bar known as the Young Lawyers Division composed of all members in good standing under the age of 36 and all members in good standing who have not been admitted to the practice of law in any jurisdiction for more than 5 years.

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252).

RULE 1-9.2 POWERS AND DUTIES

The division shall have such powers and duties as shall be prescribed by the board of governors of The Florida Bar.

RULE 1-9.3 BYLAWS

The bylaws of the division shall be subject to approval of the board of governors.

1-10. RULES OF PROFESSIONAL CONDUCT
RULE 1-10.1 COMPLIANCE

All members of The Florida Bar shall comply with the terms and the intent of the Rules of Professional Conduct as established and amended by this court.

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252).

CHAPTER 4. RULES OF PROFESSIONAL CONDUCT
PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As an adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., rules 4-1.12 and 4-2.4. In addition, there are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See rule 4-8.4.

In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or by law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system, because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of the lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct and in substantive and procedural law. A lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Zealous advocacy is not inconsistent with justice. Moreover, unless violations of law or injury to another or another's property is involved, preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and heed their legal obligations, when they know their communications will be private.

In the practice of law, conflicting responsibilities are often encountered. Difficult ethical problems may arise from a conflict between a lawyer's responsibility to a client and the lawyer's own sense of personal honor, including obligations to society and the legal profession. The Rules of Professional Conduct often prescribe terms for resolving these conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. These issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities. Within that context, the legal profession has been granted powers of self-government. Self-regulation helps maintain the legal profession's independence from undue government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on the executive and legislative branches of government for the right to practice. Supervision by an independent judiciary, and conformity with the rules the judiciary adopts for the profession, assures both independence and responsibility.

Thus, every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves.

Scope:

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms of "must," "must not," or "may not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts

within the bounds of that discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role.

The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The comments are intended only as guides to interpretation, whereas the text of each rule is authoritative. Thus, comments, even when they use the term ""should," do not add obligations to the rules but merely provide guidance for practicing in compliance with the rules.

The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law. The comments are sometimes used to alert lawyers to their responsibilities under other law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, for example confidentiality under rule 4-1.6, which attach when the lawyer agrees to consider whether a client-lawyer relationship will be established. See rule 4-1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing

to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating a substantive legal duty. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of a breach of the applicable standard of conduct.

Terminology:

"Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See "informed consent" below. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time.

"Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in the legal department of a corporation or other organization.

"Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Lawyer" denotes a person who is a member of The Florida Bar or otherwise authorized to practice in the state of Florida.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

"Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

"Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

"Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in writing

If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time.

Firm

Whether 2 or more lawyers constitute a firm above can depend on the specific facts. For example, 2 practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by 1 lawyer is attributed to another.

With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning

"confirmed in writing," see terminology above. Other rules require that a client's consent be obtained in a writing signed by the client. See, e.g., rule 4-1.8(a). For a definition of "signed," see terminology above.

Screened

This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under rules 4-1.11, 4-1.12, or 4-1.18.

The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce, and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake these procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

In order to be effective, screening measures must be implemented as soon as practicable after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); amended March 23, 2006, effective May 22, 2006 (SC04-2246), (933 So.2d 417); amended May 21, 2015, corrected June 25, 2015, effective October 1, 2015 (SC14-2107), amended November 9, 2017, effective February 1, 2018.

4-1. CLIENT-LAWYER RELATIONSHIP
RULE 4-1.1 COMPETENCE

A lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Comment

Legal knowledge and skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in

It is contemplated that a co-counsel situation would exist where a division of responsibility is based on, but not limited to, the following: (a) based upon geographic considerations, the lawyers agree to divide the legal work, responsibility, and representation in a convenient fashion (such a situation would occur when different aspects of a case must be handled in different locations); (b) where the lawyers agree to divide the legal work and representation based on their particular expertise in the substantive areas of law involved in the litigation; or (c) where the lawyers agree to divide the legal work and representation along established lines of division, such as liability and damages, causation and damages, or other similar factors.

The trial court's responsibility when reviewing an application for authorization of a fee division under rule 4-1.5(f)(4)(D)(iii) is to determine if a co-counsel relationship exists in that particular case. If the court determines a co-counsel relationship exists and authorizes the fee division requested, the court does not have any responsibility to review or approve the specific amount of the fee division agreed upon by the lawyers and the client.

Rule 4-1.5(f)(4)(D)(iv) applies to the situation where appellate counsel is retained during the trial of the case to assist with the appeal of the case. The percentages set forth in subdivision (f)(4)(D) are to be applicable after appellate counsel's fee is established. However, the effect should not be to impose an unreasonable fee on the client.

Credit plans

Credit plans include credit cards.

Amended: Oct. 20, 1987, effective Jan. 1, 1988 (519 So.2d 971); Oct. 26, 1989 (550 So.2d 1120); Dec. 21, 1990, effective Jan. 1, 1991 (571 So.2d 451); July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); Oct. 20, 1994 (644 So.2d 282); July 20, 1995 (658 So.2d 930); Sept. 24, 1998, effective Oct. 1, 1998 (718 So.2d 1179); March 23, 2000 (763 So.2d 1002); Feb. 8, 2001 (795 So.2d 1); April 25, 2002 (820 So.2d 210); May 20, 2004 (SC03-705); corrected opinion issued July 7, 2004, (875 So.2d 448); October 6, 2005, effective January 1, 2006 (SC05-206), (916 So.2d 655); March 23, 2006, effective May 22, 2006 (SC04-2246), (933 So.2d 417); September 28, 2006, effective September 28, 2006 (SC05-1150), (939 So.2d 1032); December 20, 2007, effective March 1, 2008 (SC06-736), (978 So.2d 91); November 19, 2009, effective February 1, 2010 (SC08-1890) (34 Fla.L.Weekly S628a). Amended April 12, 2012, effective July 1, 2012 (SC10-1967), amended November 9, 2017, effective February 1, 2018 (SC16-1962); amended Jan. 4, 2019, effective March 5, 2019 (SC18-1683).

RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

(a) Consent Required to Reveal Information. A lawyer must not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

(b) When Lawyer Must Reveal Information. A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary:

(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

(3) to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with the Rules Regulating The Florida Bar; or

(6) to detect and resolve conflicts of interest between lawyers in different firms arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal confidential information, a lawyer may first exhaust all appellate remedies.

(e) Inadvertent Disclosure of Information. A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(f) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer must disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

Comment

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See rule 4-1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, rule 4-1.9(c) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and rules 4-1.8(b) and 4-1.9(b) for the lawyer's duties with respect to the use of confidential information to the disadvantage of clients and former clients.

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.

See terminology for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based on experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The principle of confidentiality is given effect in 2 related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose confidential information except as authorized or required by the Rules Regulating The Florida Bar or by law. However, none of the foregoing limits the requirement of disclosure in subdivision (b). This disclosure is required to prevent a lawyer from becoming an unwitting accomplice in the fraudulent acts of a client. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure adverse to client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. While the public may be protected if full and open communication by the client is encouraged, several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See rule 4-1.2(d). Similarly, a lawyer has a duty under rule 4-3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in rule 4-1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In this situation the lawyer has not violated rule 4-1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in subdivision (b)(1), the lawyer must reveal information in order to prevent these consequences. It is admittedly difficult for a lawyer to "know" when the criminal intent will actually be carried out, for the client may have a change of mind.

Subdivision (b)(2) contemplates past acts on the part of a client that may result in present or future consequences that may be avoided by disclosure of otherwise confidential communications. Rule 4-1.6(b)(2) would now require the lawyer to disclose information reasonably necessary to prevent the future death or substantial bodily harm to another, even though the act of the client has been completed.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in rule 4-1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in rule 4-1.6. Neither this rule nor rule 4-1.8(b) nor rule 4-1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with the rule, the lawyer may make inquiry within the organization as indicated in rule 4-1.13(b).

Dispute concerning lawyer's conduct

A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure this advice will be impliedly authorized for the

lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, subdivision (c)(5) permits this disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of complicity has been made. Subdivision (c) does not require the lawyer to await the commencement of an action or proceeding that charges complicity, so that the defense may be established by responding directly to a third party who has made the assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. A charge can arise in a civil, criminal, or professional disciplinary proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by subdivision (c) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures otherwise required or authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, rule 4-1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See rules 4-2.3, 4-3.3, and 4-4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against a supersession.

Detection of Conflicts of Interest

Subdivision (c)(6) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, for example, when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See comment to rule 4-1.17. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. The disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, subdivision (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these rules.

Any information disclosed under this subdivision may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. This subdivision does not restrict the use of information acquired by means independent of any disclosure under this subdivision. This subdivision also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, for example, when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

Acting Competently to Preserve Confidentiality

Paragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See rules 4-1.1, 4-5.1 and 4-5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to forgo security measures that would otherwise be required by this rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, for example state and federal laws that

govern data privacy or that impose notification requirements on the loss of, or unauthorized access to, electronic information, is beyond the scope of these rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see the comment to rule 4-5.3.

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule. Whether a lawyer may be required to take additional steps in order to comply with other law, for example state and federal laws that govern data privacy, is beyond the scope of these rules.

Former client

The duty of confidentiality continues after the client-lawyer relationship has terminated. See rule 4-1.9 for the prohibition against using such information to the disadvantage of the former client.

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); Oct. 20, 1994 (644 So.2d 282); March 23, 2006, effective May 22, 2006 (SC04-2246), (933 So.2d 417); amended July 7, 2011, effective October 1, 2011 (SC10-1968); amended May 29, 2014, effective June 1, 2014 (SC12-2234). Amended June 11, 2015, effective October 1, 2015 (SC14-2088).

RULE 4-1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

(a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer must not represent a client if:

(1) the representation of 1 client will be directly adverse to another client; or

(2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Informed Consent. Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;